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PARLIAMENTARY GOVERNMENT

IN THE

BRITISH COLONIES

Corrigenda

On page 108.—9th line from top, for 1878 *read* 1887.

„ 184.—2nd „ bottom, fill in after ‘*ante p.*’ 158.

„ 193.—17th „ top, for Australian *read* Australasian.

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PARLIAMENTARY GOVERNMENT

IN THE

BRITISH COLONIES

BY

ALPHEUS TODD, LL.D., C.M.G.

AUTHOR OF 'PARLIAMENTARY GOVERNMENT IN ENGLAND,' ETC.

SECOND EDITION, EDITED BY HIS SON



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EDITOR'S PREFACE.

ATTENTION is invited to the Author's Preface for a statement of the purpose and scope of this work, wherein his motive may best be understood, viz., that of upholding functions of government that nowadays are too often assailed and belittled through ignorance, misconception, or—what is more dangerously insidious than either of these—the *levelling* spirit so characteristic of the age.

From a keen sense of duty, and as a deep lover of sound doctrine in every form, he gave his whole strength, as he has been heard to remark—the full weight of his established reputation, others might say—to the above cause; the more so as he was strongly imbued with the conviction of the want of accord of such doctrines with popular conceptions of them; while in private life his exceedingly modest, retiring disposition made him shrink from notoriety, and, in the opinion of those who knew him, the intention and sincerity of his motives were beyond question.

Yet withal he had the courage of his convictions—from which nothing could make him swerve—with an entire freedom from that baneful spirit of policy, incident to the political atmosphere, that more or less

permeates official life in the Colonies. This sterling characteristic enabled him to handle the 'burning questions' referred to in his Preface without prejudice and without fear.

His exposition of some of the complex questions evoked much personal abuse, because of his disapproval of the course adopted in their settlement, that, at times, found expression in bitter terms.

His generous and sensitive nature felt deeply this unfair treatment at the hands of many who had long trusted in his opinions; for his labour and experience in the confidential councils of Governors and Administrations had dated back for more than forty years, in the capacity of constitutional adviser, to an extent not again likely to be experienced by another—as practical government in the Colony had been during a great part of that period in a state of evolution.

A few words on the personality of the Author may not be considered out of place.

Born in London, England, on July 30, 1821, he emigrated with his family to Canada when eight years of age, settling down at Toronto, then known as York. His father, a man of University education and some literary attainments, intended that his boy should be sent to the Upper Canada College. But from this intention he was dissuaded by his son, who scouted the idea—as he put it—'of coming to a new country to be educated,' and declared his intention of seeking his own livelihood. Though of such tender age, he shortly put his purpose into execution by publishing the first map extant of the town of York. To execute this

design he *paced* all the streets and reduced his measurements to a scale. A member of the local legislature was so pleased with the lad's intelligent pertinacity that he obtained a vote of the House to take copies of the map sufficient to pay the cost of engraving, and had him installed in a temporary capacity in the legislative library, then a mere nucleus of a collection in a small room.

Here—though early in his teens—the duties of a librarian seem to have been put upon him, for at the age of fourteen we find that he was acting in that capacity, his chief having been appointed a member of the Legislative Council. In the year following the position of librarian was awarded to a professional gentleman, and young Mr. Todd received the official appointment of Assistant. His studious habits rapidly developed themselves, and though library work was commenced by him so young, till the day of his death—January 22, 1884—he never lost zest for it, nor did he permit other studies of an engrossing nature to stand in its way.

In Canada he established his reputation as a constitutional authority at the age of nineteen, on the appearance of his first work (in 1840) entitled 'Practice and Privileges of the Two Houses of Parliament,' published in Toronto four years before Sir Erskine May's great treatise was brought out.

Of his *magnum opus*, 'Parliamentary Government in England,' it has been translated into two foreign languages. Sir William Anson, in his 'Law and Custom of the Constitution,'^a mentions it in these terms:—'Of

^a Clarendon Press. Oxford. 2 vols. 1892.

books dealing with the subject (constitutional law) in its entirety, I have found the fullest and the most serviceable to be the work of Mr. Alpheus Todd on “Parliamentary Government in England.”^b Mr. G. Barnett Smith, in his ‘History of the English Parliament,’^b says:—‘For its excellent statement of the theory, methods, and machinery of government Mr. Todd’s work stands alone.’ The Editor published a new edition of the work in 1889–90,^c which very shortly became exhausted. But a graceful tribute has since been paid to the reputation of the Author, in the issue of a condensed edition of the same, by the eminent historian and writer, Mr. Spencer Walpole.^d

In the present work, the Editor has—to his utmost endeavour—embodied important legislation, illustrative of the Author’s constitutional doctrines, in Canada and other Colonies, covering the past ten years—the period since the Author’s demise. In so doing, however, he has not intruded on an author’s privilege, as will be evident to the reader, but has strictly confined himself to a simple narration of facts, without obtruding his opinions or conclusions thereupon. Thus the public has the assurance that the book is the Author’s in every sense of the word.

The Editor gladly avails himself of this opportunity to express his gratitude for the invaluable assistance rendered him in the discharge of his task,—

^b Ward, Lock, Bowden and Co. 2 vols. London. 1892.

^c *Parliamentary Government in England*. New Edit. 2 vols. 1889–90. Longmans, Green and Co. (a few copies of the second volume remaining).

^d Sampson Low, Marston and Co. 2 vols. London. 1892.

To the Agents-General of the Australasian Colonies and of the Cape of Good Hope for facts supplied ;

To the Hon. David Mills, Q.C., M.P., P.C., for his kindly criticism and advice on constitutional cases ;

Likewise to R. C. Weldon, Esq., M.P., LL.D., for similar advice ;

To Mr. Robert Cassels, Q.C., Registrar of the Supreme Court ; Mr. Augustus Power, Q.C., of the Department of Justice ; and Mr. F. A. McCord, Law Clerk, House of Commons, for technical assistance on legal points.

In concluding this brief mention of the Author's work it is but just to his memory to add that it does not cover his entire field of labour. With him it was a maxim that if a man desired to attain proficiency in a study it is essential that he should have two divergent subjects to engross his attention, of which one should be the *backbone*, for the obvious reason that the mental faculties may thereby obtain a freedom from warp, and that enlargement and grasp necessary to pass from one to the other with renewed freshness and vigour.

It is the Editor's hope that he may be enabled to give to the public the result of the Author's other labours at some future period.

A. H. T.

OTTAWA : December 1893.

AUTHOR'S PREFACE.

(1880.)

IN presenting this volume to the public, I have been enabled to complete a design which I have long had in contemplation, and which was partly fulfilled when, about thirteen years ago, I published my treatise on parliamentary government in England. In the preface to the first volume of that work, I alluded to the obvious want of some manual to explain the operation of 'parliamentary government,' in furtherance of its application to colonial institutions. For over a quarter of a century my own researches had been largely directed to this subject, in assisting Canadian statesmen in giving effect to the grant of 'responsible government,' which began to be extended to the colonies of Great Britain when it was introduced into Canada in 1841. The fruit of this protracted investigation into a hitherto untrodden field was embodied in the publication, in 1867 and 1869 respectively, of the volumes above mentioned, which, however imperfectly, supplied for the first time a practical exposition of 'the laws, usages, and traditions of parliamentary government.'

The favour with which this attempt was received throughout the British dominions, and the desire so

frequently expressed for additional information upon the matter, in its relation to the British colonies, have induced me to undertake the present work.

Desirous of avoiding needless repetitions, I have referred to my former treatise in all points of detail or of general principle wherein colonial practice is professedly identical with that of the mother country, and have aimed in this volume to treat the subject from a strictly colonial aspect. This has compelled me to cite, more frequently than I could have wished, my previous publication, as it still remains the only existing work devoted to the elucidation of this important topic from a practical point of view.

It will be noticed that I have bestowed much attention to questions which have arisen in the working of the new constitution conferred upon the British North American colonies in 1867, when they were confederated into the dominion of Canada. Whilst this portion of my work is primarily intended for Canadian use, it may not be without interest or value in other parts of the empire, in anticipation of the contemplated introduction of similar institutions in South Africa and in Australia.

In the discussion of certain weighty precedents which have been recently determined in Canada and elsewhere, it is not unlikely that the opinions I have expressed thereon may differ from those entertained by prominent public men who have taken part in their consideration and settlement. I would, however, venture to affirm that I have approached the investigation of these 'burning questions' in an impartial spirit,

having no party bias or inclinations, and seeking only the public good. If my criticisms contribute, in any measure, to promote that end, they will not have been in vain.

I would further remark that in this—as in my larger work—I have directed particular attention to the political functions of the Crown, which are too frequently assumed to have been wholly obliterated wherever a ‘parliamentary government’ has been established. In combating this erroneous idea, I have been careful to claim for a constitutional governor nothing in excess of the recognised authority and vocation of the sovereign whom he represents; while, on the other hand, I have endeavoured to point out the beneficial effects resulting to the whole community from the exercise of this superintending office, within the legitimate lines of its appropriate position in the body-politic.

Practical statesmen are usually well-informed upon this question. But much ignorance and confusion of thought prevails upon it amongst all classes outside of parliament. As was pertinently observed by the Marquis of Hartington (in a debate during the session of 1879 of the Imperial parliament), ‘There is no doubt that men of great ability, in periodicals of much political influence, have put forward doctrines respecting the relations of the executive to parliament and the Crown, which are altogether contrary to the doctrines which have been generally held on both sides of this house’ (Hansard’s Debates, vol. 246, p. 318).

If, then, I appear to have laid too much stress, in

this volume, upon those attributes and functions of the Crown which are lawfully exercisable by a governor under 'responsible government,' it is because I am impressed with the great and growing necessity for properly instructing the public mind upon a vital question of practical politics. But, as this treatise is intended to be expository and not speculative, I have uniformly refrained from obtruding individual opinions, and have stated nothing therein that is not capable of proof and corroboration from the public utterances of English statesmen of the present day, irrespective of party divisions, and of unquestionable authority in the interpretation of our constitutional system.

ALPHEUS TODD.

LIBRARY OF PARLIAMENT, OTTAWA, CANADA:
January 24, 1880.

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Table of Abbreviations used in the Foot-notes.

Adderley	Adderley's Colonial Policy.
Am. L. Rev.	American Law Review.
An. Stat.	McCarty's Annual Statistician.
Ann. Reg.	Annual Register.
App.	Appeals.
App. Cases	Appeal Cases.
Appx.	Appendix.
Atts. Gen.	Attorneys General.
Austral. Dict. of Dates	Heaton's Australian Dictionary of Dates.
B. N. A. Act.	British North America Act, 1867.
Br. Quar. Rev.	British Quarterly Review.
Brit. Columb.	British Columbia.
C.	Chapter.
C. O. List	Colonial Office List.
Can. Dom. Gaz.	Official Gazette of the Dominion of Canada.
— Off. Gaz.	
— L. J.	
— L. T.	
— Sess. Pap.	Sessional Papers of the Dominion of Canada.
— Stat.	Statutes of the Dominion of Canada.
Catholic Presb.	Catholic Presbyterian.
Col.	Colonial.
Col. Const.	Colonial Constitution.
Col. Reg.	— Regulations. [Commons.]
Com. Pap.	Sessional Papers of the Imperial House of
Con. Stat. Can.	Consolidated Statutes of Canada.
Const.	Constitution.
Cont. Rev.	Contemporary Review.
Coun.	Council.
Crim.	Criminal.
Desp.	Despatch.
Div.	Division.
Dom. An. Reg.	Annual Register of the Dominion of Canada.
Drew. & Sm.	Drewry & Smale Vice-Chancellors' Reports.
Ed. Rev.	Edinburgh Review.
Eng. Const.	English Constitution.
Fort. Rev.	Fortnightly Review.
Grant	Grant's Ontario Chancery Reports.
Hans. D.	Hansard's Debates, Imperial House of Commons.
Ib.	Ibid.
Imp.	Imperial.
Int. Rev.	International Review.
Jls.	Journals.
Knapp.	Knapp's Appeal Cases (Eng.).
L. C., or L. Can. Jurist.	Lower Canada Jurist.
L. News	Legal News of Montreal.
L. R.	Law Reports.
L. T.	Law Times.
Law Mag.	Law Magazine.
Leg. Assem.	Legislative Assembly.
Leg. Coun.	— Council.

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Lords Pap.	Sessional Papers of the House of Lords.
McCarty An. Stat.	McCarty's (U. S.) Annual Statistician.
Mag.	Magazine.
Martin's Pr. Cons.	Martin's Life of the Prince Consort.
Mir. of Parl.	Mirror of Parliament.
Moore P. C.	Moore's Privy Council Cases.
N. B. Rep.	New Brunswick Reports.
N. Z.	New Zealand.
New York	State Law Reports.
Nineteenth Cen.	Nineteenth Century Review.
North Am. Rev.	North American Review.
Off.	Official.
Ont. App. Rep.	Ontario Appeal Reports.
— C. P.	— Common Pleas Reports.
— Rep.	— Reports.
— Sess. Pap.	— Sessional Papers of the Province of Ontario.
P. C. Appeals	Privy Council Appeals.
P. E. Island	Prince Edward Island.
Pap.	Sessional Papers.
Parl. Deb.	Parliamentary Debates.
— Govt.	— Government.
— Hist.	— History.
— Proc.	— Proceedings.
Peters	United States Supreme Court Reports.
Proc.	Proceedings.
Pub. Inc. & Exp.	Public Income and Expenditure.
Pugsley & Burbidge	New Brunswick Law Reports.
Pugs. N. B.	New Brunswick Law Reports.
Q. B.	Queen's Bench.
Quar. Rev.	Quarterly Review.
Queb.	Quebec.
Rep.	Reports.
Rev.	Review.
Russell & Geldert	Nova Scotia Law Reports.
S.	South.
S. Aust.	South Australia.
Sess. Pap.	Sessional Papers.
Stat.	Statutes.
Sum.	Sumner's United States Circuit Reports.
Sup. Ct. Rep.	Canada Supreme Court Reports.
Swanston Rep.	Chancery Reports (Eng.).
Todd Parl. Govt. in Eng.	Parliamentary Government in England.
U. C.	Upper Canada.
U. C. C. P. Rep.	— — Common Pleas Reports.
U. C. L. J.	— — Law Journal.
U. C. Q. B.	— — Queen's Bench Reports.
U. S.	United States.
V.	Volume.
Vic.	Victoria.
Vermont	State Law Reports.
Ves., jr.	Vesey, junr., Chancery Reports (Eng.).
West. Rev.	Westminster Review.

PARLIAMENTARY GOVERNMENT

IN THE

BRITISH COLONIES.

CHAPTER I.

THE SOVEREIGN, IN RELATION TO PARLIAMENTARY GOVERNMENT IN ENGLAND.

THE government of England is conducted in conformity with certain traditional maxims, which limit and regulate the exercise of all political powers in the state. These maxims are, for the most part, unwritten and conventional. They have never been declared in any formal charter or statute, but have developed, in the course of centuries, side by side with the written law. They embody the matured experience of successive generations of statesmen in the conduct of public affairs, and are known as the precepts of the Constitution.^a

English
constitu-
tional
maxims

Prominent amongst these constitutional maxims is the principle that 'the king can do no wrong.' Rightly understood, this precept means that the personal actions of the sovereign, not being acts of government, are not under the cognizance of the law, and that as an individual he is not amenable to any earthly power or jurisdiction. He is, nevertheless, in subjection to God and to the law. For the law controls the king, and it is, in

^a See Freeman, Growth of Eng. Const. chap. iii.

fact, 'the only rule and measure of the power of the Crown, and of the obedience of the people.'^b And while the sovereign is personally irresponsible for all acts of government, yet the functions of royalty which appertain to him in his political capacity are regulated by law, or by constitutional precept, and must be discharged by him solely for the public good, and not to gratify personal inclinations.^c

Government by prerogative.

Before the Revolution of 1688, the monarchs of England ruled by virtue of their prerogative, and with the aid of ministers of their own choice. These ministers had no necessary connection with Parliament; although, if peers of the realm, they were entitled to sit therein. The sovereign was the originator of his own policy, and was not bound to take advice before deciding upon affairs of state. Moreover, he was usually sufficiently conversant with the details of administration to be able to govern independently of the consent of his ministers. They were only answerable to Parliament for high crimes and misdemeanours, and for acts of mal-administration which were directly attributable to themselves. This method of government gave rise to frequent altercations and struggles between the Crown and Parliament, which sometimes could only be decided by an appeal to the sword.

Revolution of 1688.

The Revolution of 1688 was the great epoch at which the power of the Crown was subjected to constitutional limitations and restraints, for the purpose of bringing it into harmony with the will of Parliament. The foundation principle of monarchy, upon which the Constitution of England is based, was carefully maintained: the ancient maxim, that 'the king can do no wrong,' was deliberately re-asserted, and thereby the monarchy itself was protected from injurious aspersion

^b Sir R. Walpole, in *State Trials*, v. 15, p. 115.

^c Todd, *Parl. Govt.* v. 1, pp. 168, 242, new ed. v. 1, pp. 261, 847

or assault; but this maxim was interpreted so as to mean that no mismanagement in government is imputable to the sovereign personally. Furthermore, another counterbalancing principle of equal importance was then brought into manifestation; namely, that no wrong can be done to the people for which the Constitution does not provide a remedy. The application of these principles, at the period of the Revolution, to acts of government contributed to the introduction of our present political system, under which ministers of state participate in all the functions of royalty, on condition that they assume a full responsibility for the same, before Parliament and the people. And inasmuch as no minister could appropriately undertake to be responsible for a policy which he could not control, or for acts which he did not approve, it has necessarily followed that the direction and administration of the policy of government has passed into the hands of the constitutional advisers of the Crown for the time being; subject only to their continuing to retain the confidence of their sovereign and of Parliament, and to their administration of public affairs being approved both by the Crown and by the people.

The three leading maxims of the British Constitution, in its modern form and developments, are: the personal irresponsibility of the king; the responsibility of his ministers for all acts of the Crown; and the inquisitorial power and ultimate control of Parliament. These maxims were first distinctly asserted and potentially secured by the Revolution of 1688. Since that epoch, they have been gradually matured, by practice and precedent, so as to embody and constitute in their operation what is known as parliamentary government.

Definition of Parliamentary Government.

Personal government by royal prerogative having given place, under the British Constitution as now interpreted, to parliamentary government, the question arises

Constitutional
powers of
the sovereign.

as to what is the actual position, and what are the powers possessed by the sovereign in connection therewith. To assume that the sovereign has become 'a cipher, to be cast by political parties from one to the other, and then to be moulded as they please,'^d or 'a dumb and senseless idol,' without any measure of political power, is entirely inconsistent with the continued existence in England of a monarchical government. Such an assumption would transform the Queen's cabinet ministers into an oligarchy, exercising an uncontrolled power over the prerogatives of the Crown and the administration of public affairs, upon the sole condition that they are able to secure and retain a majority in the popular branch of the legislature, to approve their policy and to justify their continuance in office. There have not been wanting some political thinkers who have argued in favour of a system of this kind; but, however theoretically defensible it may appear from their point of view, it is not a true representation of the British Constitution, and, should it ever unhappily prevail, would deprive us of one of the main securities upon which the liberties of England depend.

Moreover, the fallacy of such an idea, and its contrariety to existing constitutional practice, will be readily apparent to those who will refer to the expressed opinions of the most eminent British statesmen of our own day upon this subject. Brougham, Grey, Russell, Derby, Gladstone, Disraeli, and Stafford Northcote—all of them representative men, of diverse parties—have severally testified, upon different occasions, to the vital and influential position which appertains to the sovereign of Great Britain under parliamentary government.^e

^d Wellington Desp. 3rd s. v. 8, p. 156.

^e See Todd, Parl. Govt. v. 1, pp. 201-211, new ed. pp. 304-316;

‘The constitutional maxim, “the king reigns and does not govern,” has never been accepted in England in the sense of reducing the sovereign to a cipher.’^f

It is true that, under our parliamentary system, which regards the sovereign as the representative and living symbol of the institutions of the country,^g rather than as an active, energetic personality, the personal will of the monarch can only find a legitimate public expression through official channels, or in the performance of acts of state which have been advised or approved by responsible ministers. But we must not lose sight of the fact that what has been termed the impersonality of the Crown only extends to direct acts of government; that the sovereign is no mere automaton, or ornamental appendage to the body-politic, but is a personage whose consent is necessary to every act of state, and who possesses full discretionary powers to deliberate and determine upon every recommendation which is tendered for the royal sanction by the ministers of the Crown. As every important act—that is to say, every thing that is not in the nature of ordinary official routine, but which involves a distinct policy, or would commit the Crown to a definite action, or line of conduct, which had not previously received the royal approbation—should first be sanctioned by the sovereign, the Crown is thereby enabled to exercise a beneficial influence, and an active supervision over the government of the empire; and an opportunity is afforded to the sovereign for exercising that ‘constitutional criticism’ in all affairs of state, which is the un-

Functions
of the
Crown.

v. 2, pp. 205–214, 408, new ed. pp. 253–261, 509. Mr. Gladstone, in *Cont. Rev.* v. 26, p. 10; and see especially his able paper, herein-after cited, in the *North Am. Rev.* v. 127, pp. 179–212. (See his *Gleanings of Past Years*, v. 1, for a reprint

of both these articles.)

^f Mr. Cardwell’s opinion, *Com. Pap.* 1867, v. 49, p. 664; *Hans. D.* v. 188, p. 1113; v. 191, p. 1705; v. 146, p. 311.

^g *Martin’s Pr. Consort*, v. 4, pp. 40, 154.

doubted right and duty of the Crown, and which, in its operation, Earl Grey, Mr. Disraeli, and Mr. Gladstone, amongst statesmen of the present generation, have each concurred in declaring to be most salutary and efficacious.^h

‘The sovereign should give himself no trouble about details, but exercise a broad general supervision, and see to the settlement of principles on which action is to be based. This he can, nay, must do, where he has responsible ministers, who are under the necessity of obtaining his sanction to the system which they pursue and intend to uphold in Parliament.’ⁱ

During the lifetime of the Prince Consort, her present Most Gracious Majesty enjoyed, as is well known, exceptional advantages in the fulfilment of the arduous and responsible duties which devolve upon the Crown. The eminent qualities of Prince Albert, his extensive and accurate political knowledge, and his varied attainments in other fields of research and observation, enabled him to render incalculable service to the Queen, and his acknowledged constitutional position as her Majesty’s *alter ego*, justified him in the performance of the onerous and multifarious duties appertaining to the ‘consort and confidential adviser and assistant of a female sovereign.’^j

After the lamented death of the Prince, in 1861, her Majesty was compelled to withdraw, for a season, into retirement, and she has never since been able to resume, as fully as before, her public and ceremonial duties. But while her long continued seclusion has been a source of universal regret, and even to some

^h Todd, *Parl. Govt.* v. 2, pp. 209, 212, new ed. pp. 257, 261, and see *post*, p. 21.

ⁱ Martin’s *Pr. Consort*, v. 5, p. 264.

^j For a discussion of the constitutional position of a prince consort, see Todd, *Parl. Govt. in Eng.* v. 1, p. 195, new ed. p. 299.

extent of complaint, 'it is the only reproach which her people have ever addressed to her.' Ten years after this overwhelming affliction befell the Queen, two eminent English statesmen gave assurance of her Majesty's unabated zeal and efficiency in the fulfilment of all other duties appropriate to her exalted station. Earl Granville, then secretary of state for foreign affairs, said, in the House of Lords, on August 8, 1871, 'I do not know any time of her life when her Majesty has given more attention than she does at present to the current business of the state, or when the interest she takes in all parliamentary and administrative measures, the knowledge she takes care to possess on all important measures, whether home or foreign, and the supervision she exercises over all appointments to be made and honours to be distributed, have been more strikingly shown.' He added, that so far from her Majesty, as some had surmised, 'only getting information from one political party,' it was characteristic of her 'that, whatever party may be in power, she ever holds the most open and confidential communications with them'; but that, 'without in any degree acting in a manner liable to misconstruction, she does see the leaders of the party in opposition to the government.'^k

A few weeks afterwards, Mr. Disraeli (then the leader of the opposition) corroborated the foregoing statement, and took occasion to observe that, although the Queen was still unable 'to resume the performance of those public and active duties which it was once her pride and pleasure to fulfil,' yet that, 'with regard to those much higher duties which her Majesty is called upon to perform, she still performs them with a

^k Hans. D. v. 208, p. 1069; Martin's Pr. Consort, v. 5, p. 286. See also the observations of Sir Stafford Northcote (chancellor of the exchequer) in House of Commons, in debate on Prerogative of the Crown. *Ib.* v. 246, p. 311.

Queen
Victoria.

punctuality and a precision which have certainly never been surpassed and rarely equalled by any monarch of these realms.' He went on to say that 'a very erroneous impression is prevalent respecting the duties of a sovereign of this country. Those duties are multifarious; they are weighty; they are incessant. I will venture to say that no head of any department of the state performs more laborious duties than those which fall to the sovereign of this country. There is no despatch received from abroad, nor any sent from the country, which is not submitted to the Queen; the whole of the national administration of this country greatly depends upon the sign-manual; and of our present sovereign it may be said that her signature has never been placed to any public document of which she did not approve. Cabinet councils . . . are reported and communicated on their termination by the minister to the sovereign, and they often call from her remarks that are critical, and necessarily require considerable attention,' . . . and 'such complete mastery of what has occurred in this country, and of the great, important subjects of state policy, foreign and domestic, for the last thirty years,' is possessed by the Queen, that 'he must be a wise man who could not profit by her judgment and experience.'¹

Adverting to a point referred to in Earl Granville's speech, in 1871, above cited, and discussing the delicate constitutional question involved in the peculiar relations occupied, as well by Baron Stockmar and by the Prince Consort, in their lifetime, towards the Throne, Mr. Gladstone—speaking with the weight which belonged to his position as an ex-prime-minister,

¹ Speech at Hughendon, on Sept. 26, 1871. Remarkable examples of judicious and efficacious criticism upon ministerial measures, submit-

ted for the consideration and approval of her Majesty, are cited in Martin's *Pr. Consort*, v. 4, pp. 78, 88, 90, 201-205, 284, 310, 486.

and with the precision which distinguishes his utterances upon public questions—claims for the sovereign liberty to seek for information, to assist her own judgment, from every available source at her command. He says, ‘it does not seem easy to limit the sovereign’s right of taking friendly counsel, by any absolute rule, to the case of a husband. If it is the Queen’s duty to form a judgment upon important proposals submitted to her by her ministers, she has an indisputable right to the use of all instruments which will enable her to discharge that duty with effect; subject always, and subject only, to the one vital condition that they do not disturb the relation, on which the whole machinery of the Constitution hinges, between those ministers and the Queen. She cannot, therefore, as a rule, legitimately consult in private on political matters with the party in opposition to the government of the day; but she will have copious public means, in common with the rest of the nation, for knowing their general views, through Parliament and the press. She cannot consult at all, except in the strictest secrecy; for the doubts, the misgivings, the inquiries, which accompany all impartial deliberation in the mind of a sovereign as well as of a subject, and which would transpire in the course of promiscuous conversation, are not matters fit for exhibition to the world.’ Of such private and confidential counsellors, Prince Albert was a conspicuous and truly normal example; ‘and another, hardly less normal, was Baron Stockmar. Both of them observed, all along, the essential condition, without which their action would have been not only most perilous, but most mischievous. That is to say, they never affected or set up any separate province or authority of their own; never aimed at standing as an opaque medium between the sovereign and her constitutional advisers. In their legitimate place, they

Formation of opinion by the sovereign.

took up their position behind the Queen; but not, so to speak, behind the Throne. They assisted her in arriving at her conclusions; but those conclusions once adopted, were hers and hers alone. She, and she only, could be recognised by a minister as speaking for the monarch's office. The Prince, lofty as was his position, and excellent as was his capacity, vanished as it were from view, and did not and could not carry, as towards them, a single ounce of substantive authority.'^m

Independent position of the sovereign

Coinciding, unreservedly, in the caution conveyed in the foregoing extract, as to the need for the most scrupulous avoidance, on the part of the sovereign, of any communication with non-official persons, which would justify an imputation of a desire to revive the unconstitutional practices of a former reign—when there was an influence behind the Throne, known as that of 'the king's friends'ⁿ—and repudiating any attempt to disturb the harmonious relations which should always subsist between the Crown and its constitutional advisers—we may nevertheless perceive, in the frank admission of the right of the sovereign to avail herself of all proper means to enlighten and inform her own judgment, how completely the independent position of the sovereign of Great Britain, under parliamentary government, is recognised by English statesmen. We may also learn from this argument that no obstacle should be interposed to prevent any legitimate endeavour, by the sovereign, to obtain all needful assistance to enable her to fulfil her constitutional functions to the best advantage. The possible abuse of such freedom of action, in any given case, would be effectually restrained by the equally inde-

^m Gladstone's *Gleanings of Past Years*, v. 1, pp. 72-74. See also

Ld. Palmerston's letter to Sir C. Phipps, in *Martin's Pr. Consort*, v.

5, p. 265.

ⁿ See Todd, *Parl. Govt.* v. 1, p. 49, new ed. p. 114.

pendent attitude of ministers towards the Crown; by their liberty to accept or to reject the ultimate conclusions of the sovereign upon all public questions; and by the consideration that they alone are held responsible to Parliament and to the nation for every act of state, and for everything which is done in the name of the Crown.

Bearing in mind the weight of responsibility which devolves upon the sovereign, personally, in the fulfilment of the onerous functions of royalty, it is manifest that a constitutional monarch 'should be, if possible, the best informed person in the empire, as to the progress of political events, and the current of political opinion, both at home and abroad.' 'Ministers change, and when they go out of office lose the means of access to the best information, which they had formerly at command. The sovereign remains, and to him this information is always open.' Moreover, 'the most patriotic minister has to think of his party. His judgment, therefore, is often insensibly warped by party considerations. Not so the constitutional sovereign, who is exposed to no such disturbing agency. As the permanent head of the nation, he has only to consider what is best for its welfare and its honour; and his accumulated knowledge and experience, and his calm and practised judgment, are always available, in council, to the ministry for the time, without distinction of party.'^o

Value of
the sove-
reign's
office.

A constitutional ruler is, in fact, the permanent president of his own ministry; with liberty to share in the initiation, as well as in the maturing of public measures: provided only that he does not limit the right of his ministers to deliberate, in private, before submitting for his approval their conclusions in council;

^o Prince Albert's Memorandum, in Martin's Pr. Consort, v. 2, p. 159.

Value of
sovereign's
functions.

and that they, on their part, are equally careful to afford to their sovereign an opportunity of exercising an independent judgment upon whatever advice they may tender for his acceptance.^p

In subjecting that advice to the scrutiny of a mind intent only upon promoting the public good, an experienced and sagacious sovereign is able (should the necessity unfortunately arise) to detect and rebuke selfish and unworthy aims, unmask the character of measures which may have been prompted by party motives rather than by a regard for the interests of the state, and exert, towards his ministers, on the public behalf, a healthy moral suasion, capable of correcting the injurious operation of partisan or sectional influences.

Safe-
guards
against
abuse of
ministeri-
al power,

As Earl Grey has pointed out, in his admirable Essay on Parliamentary Government, the obligation imposed upon the sovereign's ministers that they should obtain the direct sanction of the Crown for all their most important measures is a safeguard against abuse. 'The Crown, it is true, seldom refuses to act upon advice deliberately pressed upon it by its servants, nor could it do so frequently without creating great inconvenience. But the sovereigns of this country may, and generally have, exercised much influence over the conduct of the government; and in extreme cases the power of the Crown to refuse its consent to what is proposed by its servants may be used with the greatest benefit to the nation.'^q

Should it be needful for the sovereign to proceed to extremity, and reject the advice of his ministers, upon a particular occasion, it is for them to consider whether they will defer to the judgment of their sovereign, or insist upon their own opinion; and as a last resort they

^p See *post*, p. 21.

^q Grey, *Parl. Govt.* (ed. 1864) p. 5.

must decide whether they will yield the point of difference, or tender their resignations. For a minister, in such a position, 'is bound either to obey the Crown, or to leave to the Crown that full liberty which the Crown must possess of no longer continuing that minister in office.'^r

In such an emergency, of course, the personal will and opinions of the sovereign are, for the time, apparent and predominant. But these occasions are of rare occurrence in the practical operation of parliamentary government. And when they do happen, all possible abuse is prevented by the necessity which then arises for the sovereign to find other advisers, who are willing to accept his views, and become responsible for them to Parliament and to the country. Should he fail in this endeavour, then comes into operation one of those salutary checks, which the practice of the Constitution has imposed upon the exercise of the royal prerogative, and the sovereign is compelled to abandon a line of conduct for which he cannot find any statesmen who are willing to become responsible.

or of royal authority.

But if, in the question at issue between the sovereign and his ministers, those ministers are sustained by a majority in the Commons House of Parliament, or are in the enjoyment of the confidence of that house upon their general policy, it is still open to the Crown to appeal to the country. In order that the sovereign may be able to appeal, in a constitutional manner, from the advice of his ministers, and from the expressed approval of the ministerial policy by the popular chamber, recourse must be had to the prerogative of dissolution. It is true that this prerogative, like all other acts of sovereignty, is ordinarily exercised upon the advice of ministers, for the purpose of determining

Prerogative of dissolution.

^r Lord John Russell, Hans. D. v. 119, p. 90.

Prerogative of dissolution.

an issue between themselves and the House of Commons. But it may suitably be resorted to by the sovereign, after the resignation or dismissal of ministers whose advice the sovereign has been unable to accept, or whose policy and public conduct the sovereign has ceased to approve. This reserved power is inherent in the Crown, in the English Constitution, although it can only be constitutionally invoked upon grave necessity, and for reasons which are capable of being explained and justified to Parliament. And, as a security against arbitrary or unreasonable action on the part of the sovereign, it is needful that a new administration should first be formed, who are willing to assume responsibility for the action of the Crown in the dismissal or resignation of their predecessors; and for any consequent appeal to the constituencies. And, furthermore, that there should be a reasonable ground for believing that, upon the question involved in the change of administration, the existing House of Commons does not correctly represent the opinions and wishes of the nation.*

‘The sovereign cannot, indeed, impose a policy, either upon his minister or his Parliament, but he can dismiss his minister, and he can appeal to the country against the judgment of Parliament. George III. was strictly within his rights when he dismissed the Coalition [both in 1784 and in 1807]. William IV. was equally within his rights when he dismissed Lord Melbourne, and appealed to the country. In these several cases a great question of policy was raised, and determined by competent authority. In the one case [or, rather, in the first two cases], the action of the king was confirmed by the nation; in the other, it was re-

* See Todd, *Parl. Govt.* v. 1, p. 223, new ed. p. 328; v. 2, p. 405 *et seq.*, new ed. p. 504 *et seq.*

versed. Everything was done constitutionally and in order.'^t

Differences of opinion, between the sovereign and his constitutional advisers, upon minor matters, are easily susceptible of adjustment, by concession or compromise. But vital and essential disagreement must inevitably result in a surrender of the question at issue, or in a change of ministers. And the practical obligation, which the Crown thereby incurs, of finding a ministry who are willing to assume full responsibility for the policy which occasioned the transfer of power to themselves, and the necessity for a ratification of that policy by the newly elected House of Commons, will always suffice to restrain the Crown from an undue exercise of prerogative in this direction; and from the endeavour to impress the personal will of the sovereign upon the government of the empire, where that will is not sustained and approved, in the last resort, by public opinion and national consent.

Differences between ministers and the Crown.

Ample security is thus obtained that no changes of administration will be effected by the intervention of the Crown, but such as would ultimately commend themselves to the judgment of Parliament.

The right of a sovereign to dismiss his ministers is unquestionable; but that right should be exercised solely in the interests of the state, and on grounds which can be justified to Parliament. By the operation of this principle, the personal interference of the sovereign in state affairs is restrained within appropriate limits. It is prevented from assuming an arbitrary or self-willed aspect, and is rendered constitutional and beneficent.

Right of sovereign to dismiss ministers.

Thus far, we have been endeavouring to ascertain the exact limits within which, in the constitutional

^t Ed. Rev. v. 148, p. 274, and see Mr. Gladstone's remarks in his *Gleanings of Past Years*, v. 1, p. 231.

Limitations on the action of the Crown.

monarchy of Great Britain, the Crown is competent to act, in accepting or rejecting the advice of ministers who are responsible to Parliament for the government of the empire. We have considered the circumstances under which the sovereign would be justified in withholding his consent from recommendations submitted for his approval, and the ultimate consequences of such disagreement. And we have arrived at the conclusion that, under parliamentary government, the national will, as conveyed to the sovereign through ministers in whom Parliament, and particularly the House of Commons, has placed its confidence, must finally and absolutely prevail.

The unqualified acceptance and cordial recognition of this principle, by the occupants of the throne, since the constitutional system of England has assumed its present shape, have contributed to produce the best understanding between the sovereign and Parliament without hindering the exercise of the rightful influence of the monarch in the conduct of public affairs.

On the one hand, the sovereign supports frankly and honourably, and with all his influence, the ministry for the time being, so long as it commands a majority in the House of Commons, and administers the government with integrity, for the welfare of the nation. Elevated above the blinding influences of party, and intent only upon promoting the public good, the sovereign never ceases to influence, by opinion or suggestion, the direction of the state. And to this end he is free to avail himself of all the opportunities afforded by his exalted station and eminent advantages. By suggestion or remonstrance, by impartial advice, and by enlightened criticism, proceeding from a mind that should be stored with knowledge and experience upon all affairs of state, or questions of public policy, that might at any time demand consideration or settlement, the influence of

Interaction between the Crown and its advisers.

the monarch may be legitimately exercised and expressed. But, the final conclusion of the matter must rest with the minister, upon whom devolves responsibility to Parliament for every act of executive authority.

On the other hand, it is in the highest degree unwarrantable to assume that any exception exists to the operation of the constitutional rule which requires that the ministers of the Crown should be held responsible for the performance, by the sovereign, of all acts of state. It is obviously impossible to require responsibility where power has not been previously entrusted. Accordingly, an endeavour to exempt from the operation of this rule the exercise of any prerogative, or the fulfilment of any function of royalty, would be a violation of the first principles of parliamentary government. The prerogatives of the Crown in relation to the army and navy, and in the direction of the foreign policy of the empire, were at first, and for a time, practically excluded from ministerial control; but these monarchical functions gradually became subject to the supervision of ministers:^u and it is now obvious that any attempt on the part of the sovereign to retain in his own hands power, in respect to military administration or diplomacy, would be as inconsistent with constitutional usage as would be the personal and direct interference by the sovereign in domestic affairs.^v In all acts of government, the ministers of the Crown are required to assume, on behalf of and with the consent of the sovereign, the burden of personal power, and thereby relieve the Crown of all personal responsibility. Even in his choice of a first minister, which has been termed 'the only personal act the King of England

Unreserved application of ministerial responsibility.

^u See Todd, *Parl. Govt.* v. 1, pp. 44, 56; new ed. pp. 109, 121.

^v Amos, *Fifty Years of Eng. Const.* p. 315.

has to perform,'^w that choice is practically influenced by the necessity for its being confirmed by the approbation of Parliament: so that, in a constitutional point of view, so universal is this principle that 'there is not a moment in the king's life, from his accession to his demise, during which there is not some one responsible to Parliament for his public conduct; and "there can be no exercise of the Crown's authority for which it must not find some minister willing to make himself responsible."'^x

The political acts of the sovereign during a ministerial interregnum are no exceptions to this rule. When Sir Robert Peel took office, after the dismissal, by William IV., of the Melbourne administration, he 'accepted the responsibility of everything that had been done in the interval between his accession to office and the dismissal' of his predecessor, thereby proving that not even in such an extreme case 'could the Crown itself commit an act which could be the subject of censure or blame.'^y The reasonableness of such a rule, as well as its necessity, cannot be questioned. 'An incoming premier, in order to justify his own acceptance of office, must acquaint himself with the circumstances in which the offer is made, including all that has been done since the office became vacant; and his acceptance of office thus becomes a guarantee to the nation that, to the best of his judgment and conscience, everything has been rightly done.'^z

Irrespon-
sibility of
the sove-
reign.

The personal irresponsibility of the sovereign, and his absolute immunity from the consequences of misgovernment, is a fixed principle in the English political system. 'There is no provision in the law of the United Empire, or in the machinery of the Constitution, for calling the sovereign to account; and only in one solitary and improbable, but perfectly defined, case—that of his submitting to the jurisdiction of the Pope—is he deprived by statute of the throne. Setting aside that peculiar exception, the offspring of a neces-

^w By the Duke of Wellington: see Colchester Diary, v. 3, p. 501.

^x Todd, v. 1, p. 170; new ed. p. 266.

^y Mr. Courtney in Hans. D. v. 246, p. 253.

^z H. Dunckley in Fort. Rev. v. 25, n.s. p. 870.

sity still freshly felt when it was made, the Constitution might seem to be founded on the belief of a real infallibility in its head.

The counterpoise and correlative of this constitutional maxim is in another, no less important, which affixes upon the cabinet—in other words, upon the advisers and ministers of the Crown—the ultimate and unqualified ‘responsibility of deciding what shall be done in the Crown’s name, in every branch of administration, and every department of policy, coupled only with the alternative of ceasing to be ministers, if what they may advisedly deem the requisite power of action be denied them.’ The political action of the monarch must invariably and ‘everywhere be mediate, and conditional upon the concurrence of confidential advisers.’ He cannot ‘assume or claim for himself final or preponderating, or even independent, power in any one department of state.’

The cabinet.

‘The cabinet is the threefold hinge that connects together for action the British Constitution of King or Queen, Lords, and Commons. Upon it is concentrated the whole strain of the government, and it constitutes, from day to day, the true centre of gravity for the working system of the state, although the ultimate superiority of force resides in the representative chamber.’ And upon the cabinet ‘it devolves to provide that the House of Parliament shall loyally counsel and serve the Crown, and that the Crown shall act strictly in accordance with its obligations to the nation.’ It is, therefore, incumbent upon ministers always to remember that they are charged with the defence and maintenance of the rights of the Crown under the British Constitution, and that it is their especial duty to protect and preserve intact, to the utmost of their power, the royal prerogative. Practically, ever since the commencement of the Reform movement, in 1830,

Duty of ministers to the Crown.

Danger of
minis-
terial
oligarchy.

the constitutional monarchy of England has been in danger, through the onward progress of democratic ideas, of being converted into a purely ministerial oligarchy; to the detriment, not only of the personal rights of the Crown in the body-politic, but also of those vital interests therein which are of national concern, and which it is the peculiar province of the sovereign to conserve. It is upon the fidelity of ministers to the principles of the Constitution, as well as upon their personal loyalty to the sovereign, that the nation must rely for the prevention of such a calamity. 'This ring of responsible ministerial agency forms a fence around the person of the sovereign, which has thus far proved impregnable to all assaults.'

'In the face of the country, the sovereign and the ministers are an absolute unity. The one may concede to the other: but the limit of concessions by the sovereign is at the point where he becomes willing to try the experiment of changing his government; and the limit of concession by the ministers is at the point where they become unwilling to bear, what in all circumstances they must bear while they remain ministers, the undivided responsibility of all that is done in the Crown's name.'

Dismissal
of minis-
ters.

'There is, indeed, one great and critical act, the responsibility for which falls momentarily or provisionally on the sovereign; it is the dismissal of an existing ministry, and the appointment of a new one.' 'Unconditionally entitled to dismiss the ministers, the sovereign can, of course, choose his own opportunity. He may defy the Parliament, if he can count upon the people. William IV., in the year 1834 [when he dismissed the government of Lord Melbourne], had neither Parliament nor people with him. His act was within the limits of the Constitution, for it was covered by the responsibility of the acceding ministry. But it

reduced the liberal majority from a number considerably beyond three hundred to about thirty, and it constituted an exceptional, but very real and large, action on the politics of the country by the direct will of the king.'

'But this power of dismissing a ministry at will, large as it may be under given circumstances, is neither the safest, nor the only power which, in the ordinary course of things, falls constitutionally to the personal share of the wearer of the Crown. He is entitled, on all subjects coming before the ministry, to knowledge and opportunities of discussion unlimited save by the iron necessities of business. Though decisions must ultimately conform to the sense of those who are to be responsible for them, yet their business is to inform and persuade the sovereign, not to overrule him. Were it possible for him, within the limits of human time and strength, to enter actively into all public transactions, he would be fully entitled to do so. What is actually submitted is supposed to be the most fruitful and important part, the cream of affairs. In the discussion of them, the monarch has more than one advantage over his advisers.' 'He may be therefore a weighty factor in all deliberations of state.' The sovereign is, moreover, entitled to invite the consideration of ministers to any matter or question which may appear to the Crown to be deserving of attention. This privilege is not to be regarded as warranting the initiation, by the sovereign, of questions of public policy, in derogation of the special functions and responsibility of the advisers of the Crown. The right to initiate, in the sense of dictation, would involve a claim to control or impair the right of free deliberation, and would savour too much of personal government. It is otherwise when the sovereign simply suggests to ministers topics or arguments, in relation to public

(1) Constitutional powers of the sovereign.

(2)

Responsibility attached to ministers and not to the Crown.

affairs, to which their consideration is invited, without endeavouring to coerce their freedom of action or of deliberation thereon. If the ministry agree to carry out such suggestions, they must do so on condition of assuming entire responsibility for the same; for no responsibility can be attached to the occupant of the throne.^a After all, the power of the sovereign 'spontaneously takes the form of influence; and the amount of it depends on a variety of circumstances—on talent, experience, tact, weight of character, steady untiring industry, and habitual presence at the seat of government. In proportion as any of these might fail, the real and legitimate influence of the monarch over the course of affairs would diminish; in proportion as they attain to fuller action, it would increase. It is a moral, not a coercive, influence. It operates through the will and reason of the ministry, not over or against them.'

Supremacy of the House of Commons.

Finally, 'it is a cardinal axiom of the modern British Constitution, that the House of Commons is the greatest of the powers of the state.' It is to the House of Commons that every act of government, performed by responsible ministers in the name and on behalf of the Crown, must be explained and justified, and by them that it must be ultimately approved. And 'the sole appeal from the verdict of the house is a rightful appeal to those from whom it received its commission.'

The quotations, in the seven preceding paragraphs, are taken from a paper by the Rt. Hon. W. E. Gladstone with the fanciful title of 'Kin beyond the Sea,' first published in the 'North American Review' for Sept.-Oct. 1878 (and afterwards included in his 'Gleanings of Past Years,' vol. i. pp. 203-248), which attracted my attention after the previous pages were written. The intrinsic value of Mr. Gladstone's observations upon the question under discussion, and their complete accord with the opinions advanced in

^a Langmead, Eng. Const. Hist., ed. 1890, p. 718n.

the text, induced me to epitomise them, in this form, as corroborating my own exposition of the subject. The whole paper is deserving of careful study.

The strict adherence to the maxims of parliamentary government which has characterised the conduct of her Majesty Queen Victoria, since her accession to the throne, is too well known to need remark in these pages. But it fortunately happens that the public has been placed in possession of her Majesty's own ideas of her duty as a constitutional sovereign. Writing to the Emperor Napoleon III., in explanation of the difference between the English and French systems of government, the Queen observes: 'I am bound by certain rules and usages. I have no uncontrolled power of decision. I must adopt the advice of a council of responsible ministers, and these ministers have to meet and to agree on a course of action, after having arrived at a joint conviction of its justice and utility. They have, at the same time, to take care that the steps which they wish to take are not only in accordance with the best interests of the country, but also such that they can be explained to and defended in Parliament, and that their fitness may be brought home to the conviction of the nation.' In this system, her Majesty proceeds to point out, she has an advantage of which the Emperor of the French is deprived: 'I can allow my policy free scope to work out its own consequences, certain of the steady and consistent support of my own people, who, having had a share in determining my policy, feel themselves to be identified with it.'^b

Queen
Victoria.

From the secrecy which properly enshrines the intercourse between the Crown and its advisers, it rarely happens that the opinions or conduct of the sovereign

^b Martin's Pr. Consort, v. 3, pp. 397, 398.

Queen
Victoria.

in governmental matters become known to the public at large. Accordingly, those functions of the Crown which are most beneficial in their operation are apt to be undervalued; because, whilst strictly constitutional, they are hidden from the public eye. But no attentive reader of English political history, since the accession of Queen Victoria, can fail to have noted frequent instances of timely action, wise interposition, or valuable suggestion upon affairs of state, which have emanated from Her Most Gracious Majesty or her consort; and which, being approved and endorsed by the existing administration, have contributed largely to the promotion of the public good. In *Martin's Life of Prince Albert*, especially, repeated mention is made of valuable memorandums upon public questions, prepared by the Queen, or by the Prince on her behalf, and submitted for the consideration of ministers. These papers were often of great service, and sometimes contained the germs of practical administrative reforms, which, sooner or later, were advantageously accomplished. And this was in addition to the unceasing exercise, by the sovereign, of that 'constitutional criticism' over all state papers, already referred to; and which on one memorable occasion (during 'the Trent affair' in 1861) led to the modification of terms of remonstrance addressed in a despatch to the United States government, and largely contributed to avert a threatened rupture between Great Britain and America.^o

These facts and considerations may suffice to explain the actual position and powers of a British sovereign, under parliamentary government.

^o *Martin's Pr. Consort*, v. 2, pp. 433-445; v. 3, pp. 146, 382; v. 5, pp. 418-426.

CHAPTER II.

THE APPLICATION OF PARLIAMENTARY GOVERNMENT TO
COLONIAL INSTITUTIONS.

LET us now turn our attention to the colonies of Great Britain, and briefly examine the reasons which led to the introduction therein of the political system of the mother country. This will lead us to consider the manner in which local self-government has been gradually applied to colonial institutions.^a

Until within the past fifty years, the administration of public affairs in such of the British colonies as were in the possession of representative institutions was undeniably in an unsatisfactory state.

Old system of colonial government.

Under this polity, the responsibility of government was centred, absolutely and exclusively, in the governor. He was, indeed, assisted by an executive council, nominated by the Crown, and selected from the principal administrative officers in the colony. But these functionaries, though accountable to the Crown for the faithful discharge of their respective official duties, were not answerable, either individually or collectively, for the result of the advice they might offer to the governor. He consulted them at his own discretion; and the responsibility of government in no way devolved

^a For a return showing the constitution of the executive in colonies, the constitution of representative assemblies, with qualifications for the same, *vide* Com. Pap. 1889, v.

55, p. 71; and for practice and regulations of legislative assemblies in colonies possessing responsible government, *vide* Com. Pap. 1881, v. 74, p. 565; *Ib.* 1883, v. 54.

upon them. This rested solely upon the governor ; and he was responsible only to the supreme authority of the empire.^b

Defects of
the old
colonial
system.

Complaints of misgovernment, and of the want of harmony between the executive and legislative bodies, in the principal colonies of Great Britain, were frequent ; and the necessity for some reform in colonial administration was obvious and unquestionable, though the sagacity of British statesmen was severely tried to find an adequate solution of this perplexing and difficult problem. It was during the administration of Lord Melbourne (in the years 1835 to 1841) that a remedy was first devised for colonial grievances, whereby the prevailing discontents in the colonies were removed. This was effected by the wise adaptation of British constitutional principles to colonial polity ; and by the gradual introduction into each dependency, according to its political condition and circumstances, of the principle of self-government in all matters of local concern, coupled with the unreserved application, in regard to the same, of the constitutional maxim of ministerial responsibility to the colonial assembly.^c

Introduc-
tion of re-
sponsible
govern-
ment.

During the period of transition from the paternal government of the colonial office in London to the establishment of self-government in British North America and in Australia, the office of her Majesty's secretary of state for the colonies was held, first, by Lord John Russell, from 1839 to 1841 ; and afterwards in succession, from 1841 to 1852, by Lord Stanley, by Mr. Gladstone, and by Earl Grey. So that all these eminent statesmen, representing both political parties, shared in the work of extending to the most distant parts of the empire the full benefits of the British Constitution.

^b Votes and Proc. Leg. Assem., N. S. Wales, 1859-60, v. 1, p. xlviii.
^c Mills, Col. Const., Introd. p. 1180.

In proof of the extensive powers of self-government which have been conceded to the colonies of late years, it will suffice to notice the course of imperial legislation on the subject between the years 1850 and 1877. In 1850, by the Imperial Act, 13 & 14 Vic. c. 59, sec. 32, authority was granted to the existing legislatures in Australia to alter their constitutions at their discretion by the introduction of the popular element therein, and by establishing distinct houses on the model of the Imperial Parliament. The only stipulation required was that before the new constitutions should take effect, they should receive the approval of the Crown, and should have remained on the table of the Houses of Lords and Commons for thirty days. In 1863, by the Imperial Act 26 & 27 Vic. c. 84, any doubts in respect to the mode of exercising these ample powers were removed. In 1865, by the Act 28 & 29 Vic. c. 63, sec. 5, all representative legislatures in the colonies were declared to be in possession of full power to frame and enact laws in relation to their local constitution and to the powers and procedure of their legislative bodies. The Act passed in 1867 for the future government of British North America was based upon resolutions previously agreed to by delegates from the various colonies included in the proposed Confederation (see *post*, p. 432), and the similar statute, passed in 1877 to provide for the union of the South African colonies, was a mere outline, to which the assent of the local authorities had been previously obtained, but which is not intended to be elaborated into a definite and complete shape until the details of the scheme shall have been considered and approved by the several colonies and states proposed to be included in the Act of Union (see *post*, p. 430). Moreover, by the British North America Act, 1867, sec. 92 (1), the legislatures of the several provinces of the new Dominion were clothed with plenary

Imperial
legislation
for the
colonies.

authority to amend their respective constitutions from time to time; save only as regards the office of lieutenant-governor, whose position, powers, and functions are defined by the imperial statute. Already one of the Canadian provinces (Manitoba) has availed itself of this permission by passing an Act to abolish the upper legislative chamber (see *post*, p. 696).

Local self-
govern-
ment.

The introduction of 'responsible government' into the British colonies was an event which it required no legislative process to effect or ratify. It scarcely necessitated any alteration in the governor's 'Commission and Instructions'; although, as the new system has matured, these organic instruments of colonial government have been occasionally modified, so as to bring them into more perfect accord with the existing polity. The only definite change in the royal instructions upon the introduction of responsible government into a colony was to provide that henceforth the members of the Executive Council should be appointed with the understanding that, upon their ceasing to retain the confidence of the popular branch of the legislature, they must resign office. But, in connection with this virtual transfer of power from an irresponsible to a responsible executive, the imperial government surrendered the exercise of local patronage; and appointments to places of power and profit in the colony passed from the hands of the governor and the home authorities into those of the Executive Council, or 'responsible' ministry.

At the first introduction of this new method of administration, it was frequently necessary for the secretary of state to advise, admonish, and instruct the Queen's representative in the several colonies, in the application of the novel principles of parliamentary government to colonial use; and to assist in determining controversies between the governor and his advisers,

or between the local executive and the legislative bodies. But gradually, as the colonies which were intrusted with powers of local self-government began to appreciate the value of the gift and the obligations which it entailed upon them to use their freedom with wisdom and mutual forbearance, it has become the policy of the imperial government to withdraw from any interference with colonial legislation and administration in matters of local concern.^d

The mother country, however, still retains the right to interpose—either by advice, remonstrance, or, if need be, by active measures of control—whenever the powers of self-government are attempted to be exercised, by any colony, in an unlawful, unconstitutional, or oppressive manner.^e ‘The whole question of the relations of the imperial authority to the representative colonies is one of great difficulty and delicacy, **It requires consummate prudence and statesmanship to reconcile the metropolitan supremacy with the worthy spirit of colonial independence.** As a matter of abstract right, the mother country has never parted with the claim of ultimate, supreme authority for the imperial legislature. If it did so, it would dissolve the imperial tie, and convert the colonies into foreign and independent states.’^f

Imperial
control.

The only instance wherein it would seem that imperial intervention and control had been formally surrendered is in respect to the colonies which are now included as provinces in the Dominion of Canada, and in reference, especially, to local legislation in those provinces. By the British North America Act, 1867, section 90, it is provided that the authority for determining upon the expediency of disallowing provincial

How exer-
cised in
Canada.

^d See *post*, pp. 182, 200, 216, 511.

^e See *post*, p. 158.

^f ‘Historicus’ (Sir W. Vernon-

Harcourt) in the London ‘Times,’ June 1, 1879, p. 10.

Imperial
non-inter-
vention in
provincial
matters.

statutes, or withholding the royal assent from reserved bills passed by the provincial legislatures, shall be the governor-general of Canada, and not the Queen. This declaration of the Imperial Parliament has been construed by the imperial government itself to be a virtual relinquishment of the right to interfere with provincial legislation under any conceivable circumstance; and as vesting in the Dominion governor in council acting under the authority of the imperial statute aforesaid an absolute and unlimited responsibility for deciding thereupon.^g But this position cannot be maintained without some qualification. The acts of all subordinate legislatures throughout the empire must be liable to the constitutional oversight and control of the Crown in the last resort. This is necessary, not only for the purpose of maintaining the ultimate authority of the supreme power, but likewise for the purpose of insuring that no colonial or provincial legislation shall be exercised unlawfully, or to the prejudice of other parts of the empire. With this proviso, it is understood that the imperial government—with the sanction of Parliament—have delegated to the governor-general in council the exercise of the prerogative of the Crown in the control of all provincial legislation within the Dominion, and will not directly interpose therein, except under very special and extraordinary contingencies, which could neither be anticipated nor defined beforehand.^h

And here it may be well to remark that the gradual relaxation, by the mother country, of the tie of political dependence on the central authority of the empire, in respect to any British colony, or even the actual sundering of connection between them, does not necessarily involve the overthrow or abandonment of the system of parliamentary government which,

^g See *post*, pp. 442, 457, 462, 476-79. ^h See *post*, pp. 158, 483, 527.

Adapta-
tion of
parliamen-
tary gov-
ernment
to an inde-
pendent
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nity.

after the model of the parent state, has been established therein. That system might be suitably retained, on account of its obvious advantages, long after the control of the mother country has been relaxed, or even withdrawn.

But in order to secure to a colony the benefit of British institutions, after the relinquishment of the right to interfere with its local self-government, the limits of authority appropriate to the governor should be well defined and carefully secured. To ascertain those limits and to define such powers, we must study the complex phenomena of the British Constitution. In that admirable system, as settled by constitutional usage within the past sixty years, there is—as we have sought to show in the preceding pages—a practical recognition of the authority which appertains to the Crown in a limited monarchy; controlled by the unreserved assertion and exercise of the principles of ministerial responsibility, and of the ultimate supremacy of Parliament. These several principles must each be maintained inviolate, and in harmonious action, wherever it is sought to perpetuate, in any land under whatsoever political conditions, the blessings of constitutional government. And, even in the supposable case of the amicable separation of a colony from the parent state, the superior advantages of possessing institutions based upon the stable foundation of a limited monarchy, and similar in principle to those of England, would naturally induce the young community to retain, with as little alteration as possible, the most prominent features of a polity that has, for so many generations, preserved freedom without lawlessness to the British nation.

Powers of
consti-
tutional
governor.

These considerations have led to the present attempt to depict, in the first place, the actual position of the sovereign in connection with parliamentary institu-

Functions
of a
consti-
tutional
governor.

tions, in the mother country, and then to point out the corresponding position and functions of a constitutional governor, in self-governing communities within the limits of the British Empire.

There is, no doubt, a general impression abroad, amongst persons who have not bestowed much thought upon the matter, that the governor of a British colony, or province, is little less than an ornamental appendage to our political system; necessary, to fulfil certain ceremonial duties; useful, to represent the community at large upon public occasions, or as the mouth-piece of public sentiment; and of unquestionable service to society, in the discharge of a dignified and liberal hospitality, to be freely extended to whoever may be a suitable recipient of viceregal favour, without distinction of creed or party.

But if this were all that we had a right to expect from a governor, it would be quite insufficient to justify the pre-eminence which is attached to his office as a representative of the Crown. Without underrating for a moment the incalculable advantages which society and the state derive from the fulfilment of the duties above enumerated, by men in exalted positions—assisted by the ladies of their household—such ceremonial observances and festivities might, without much loss of dignity or efficiency, be assigned to cabinet ministers, and other prominent officers of government, of adequate rank and fortune.

“ The governor of a British dependency, however, within the limits prescribed by his commission, is essentially a political officer; and the necessity for his office must be estimated according to the gravity and importance of the duties allotted to him in the body-politic. If his duties in that relation are mainly formal, and his political functions of small account, the continuance of the office will be apt to be regarded as

an expensive luxury, which cannot be justified by an economical people, or endured in an age which is intolerant of shams.

Functions
of a
consti-
tutional
governor.

But if, on the other hand, a constitutional governor is actually invested with an authority which is eminently capable of being employed for the public good; and if he fills a place of trust, wherein he is competent, upon fitting occasions, to interpose to guard and protect the political liberties of those over whom he presides,—then it becomes the interest as well as the duty of all good citizens to respect his office, and to strengthen and uphold him in the exercise of its lawful prerogatives.

The gradual but vital change which the present generation has witnessed in the relations of executive authority, in the self-governing colonies of the British empire, to the people, in their local legislatures, has led to the impression that no political duties remain to be fulfilled by a constitutional governor, save only such as are of a formal and ceremonial kind.

This idea has been fostered by the wide-spread but most erroneous assumption that the sovereign herself, whose commission the governor holds, has ceased to be to any appreciable extent a power in the state. We have shown the falsity of this belief, and have endeavoured to point out some of the most prominent benefits which accrue to a nation from the existence and operation of the monarchical element in its political constitution.

In the various dependencies of the British empire which are in the enjoyment of representative institutions, their respective constitutions are all, with more or less distinctness, framed on the model of the parent state.

Colonial
institu-
tions.

In the debates on the Quebec Government Bill of 1791—which was the first attempt to introduce in a colony by imperial legislation

Colonial
institu-
tions.

the institutions of the mother country—Mr. Fox ‘laid it down as a principle never to be departed from, that every part of the British dominions ought to possess a government, in the constitution of which monarchy, aristocracy, and democracy were mutually blended and united.’¹

The sovereign, the House of Lords, and the House of Commons are severally reproduced, in so far as the altered circumstances of colonial dependence will permit, by a governor, who represents the Crown; by a legislative council or senate—either nominated by the Crown or chosen by election—which is intended to exercise ‘the legislative functions of the House of Lords’; and by a popular chamber, which possesses, within the colony, ‘the rights and powers of the House of Commons.’

This distinction between the constitutional rights and powers of the two houses is taken from a formal definition of the constitution of the colony of Victoria, which was accepted by the Crown and by both houses of parliament in that colony.²

The
governor.

In every British colony of adequate extent and importance, the personal authority of the Crown is represented and monarchical functions discharged by a governor, who is nominated to his office by the sovereign in council, and appointed by letters-patent under the great seal; his jurisdiction and powers being defined by the terms of his commission, and by the royal instructions which accompany the same.

A governor so appointed is empowered, by his commission, ‘to do and execute all things that shall belong’ to his office, and be appropriate to the trust confided to him by the royal instructions, then or afterwards to be communicated to him through one of her Majesty’s principal secretaries of state, who is the constitutional mouthpiece of the Crown.

¹ Parl. Hist. v. 29, p. 409. See Stokes, *Const. of Colonies*, ch. vii.

² Victoria Leg. Assem., *Votes and Proc.* 1877-78, v. 1, pp. 192, 289.

The
governor.

The Royal Instructions are directly referred to in the British North America Act, 1867, sec. 55, and in the South Africa Act, 1877, as a part of the constitutional law, for the guidance of a governor. They are issued upon the responsibility of the ministers of the Crown, and especially of the secretary of state for the colonies. The authority attributed to instructions and official regulations, issued by direction of the Crown through a secretary of state to a governor, as being sufficient, under certain circumstances, to override a general law, is remarkably exemplified in certain official correspondence concerning the Governor's salary in Queensland.^k

He is authorised to exercise the lawful powers and prerogatives of the Crown in assembling, proroguing, and dissolving the colonial parliament; ¹ to give or withhold the royal assent to bills passed by the parliament; or to reserve them for the signification of the royal pleasure, pursuant to his instructions from the Crown. He is empowered to appoint to office all ministers of state and other public officers in the colony, and upon sufficient cause to suspend or remove them from office. He is authorised, under certain restrictions, to administer the prerogative of mercy, by the reprieve or pardon of criminal offenders within his jurisdiction; and to remit fines and penalties due to the Crown. All moneys to be expended for the public service are issued from the treasury, under the governor's warrant. And furthermore, it is expressly declared that, 'if anything should happen which may be for the advantage or security of the colony, and is not provided for in the governor's commission and instructions, he may take order for the present therein.'^m

It is true that the governor of a colony is not a vice-

^k Leg. Coun. Jour. 1872, p. 777.

¹ A governor is competent to open and to close Parliament by commissioners acting on his behalf (New Zeal. Leg. Coun. Jour., Sept. 1, 1880. Queensland Leg. Coun. Jour. 1873, p. 1), or to close a session of Parliament by proclamation (*Ib.*

1879. Sess. 1, p. 21. Tasmania, March 11, 1880. N. S. Wales Leg. Coun. Jour., April 6, 1881. Cape of Good Hope Assem. Votes, Feb. 7, 1883.) And see *post*, p. 161.

^m Col. Reg. 1892, No. 34.

The
governor.

roy, and that unlimited sovereign authority is not delegated to him. He cannot exercise all the prerogatives of the Crown, but only such as are expressly or impliedly included within the scope of his commission. The lawful extent of a governor's powers has, in repeated instances, been ascertained and determined by courts of law.ⁿ Nevertheless, there is a general devolution, to every colonial governor, of so much of the authority of the Crown as may be necessary for the purpose of administering the government of the colony over which he is placed by the sovereign, whose office and authority he represents. Pursuant to his commission and the accompanying instructions, he becomes within the limits assigned to him the embodiment and expression of the monarchical element in the colonial polity, so far as that element can find a constitutional channel for its exercise under parliamentary government. The office of governor is as much a constituent part of the constitution in every colony as is that of either of the other branches of the local legislature. A constitutional governor is not merely the source and warrant of all executive authority within his jurisdiction: he is also the pledge and safeguard against all abuse of power, by whomsoever it may be proposed or manifested; and to this end he is entrusted with the maintenance of certain rights and the performance of certain duties which are essential to the welfare of the whole community. And, while he may not encroach upon the rights and privileges of other portions of the body-politic, he is equally bound to preserve inviolate those which appertain to his own office; for they are a trust which he holds, in the name and on the behalf of the Crown, for the benefit of the people.

ⁿ See Broom, *Const. Law*, pp. App. Cas. 102 And the *Law Mag.* 623-650. *Musgrave v. Pulido*, L. (1861) v. 12, pp. 170 185. *T. Rep. n.s.* vol. 41, p. 629; 5 L. R.

Should a governor exceed his rightful powers, or commit any act to which exception could be justly taken, an appeal is always open to the sovereign, through the secretary of state,^o and to the Imperial Parliament, which is the grand inquest of the nation for the redress of all grievances.

The governor.
appeals

In 1887 the Governor of the Mauritius—Sir John Pope Hennessy—was suspended from office pending the investigation, by a Royal Commission of Inquiry, into charges preferred against him. Though Sir Hercules Robinson's report of the findings of the Commission was not laid before the Imperial Parliament, it appears that the alleged charges were:—'That the policy and utterances of the governor have mainly revived race animosities and religious antagonism in Mauritius; that he has allied himself to a party and shown himself a bitter partisan; and that, owing to his disposition, differences have arisen between him and nearly all the leading officials.'^p The colonial secretary—Sir Henry Holland—in a despatch dated July 12, 1887, gives the conclusions he arrived at after hearing the defence of Sir J. P. Hennessy to the charges brought against him before the Commission of Inquiry, also reviewing the question, and decided, not without considerable hesitation, 'that sufficient cause has not been shown to justify the removal of Sir John Pope Hennessy from the office of Governor of Mauritius.'^q

But a governor is not personally responsible for acts of state, or for acts done upon the advice of his appointed legal adviser, to the colonial parliament or to any local tribunal; save only in respect to civil or criminal liability which he may have incurred for personal acts of wrong-doing committed while holding the royal commission, and wherein the courts of law are capable of affording redress or of awarding punishment.^r

^o Col. Reg. 1892, No. 225. For complaint preferred against governor of Crown Colony see case of Governor of British Honduras, Com. Pap. 1881 v. 65. p. 1. For other cases see *post*, p. 141, n. Procedure on complaints against governors in self-governing colonies see *post*, pp.

52, 660.

^p The Colonies and India, 1887, July 22, p. 21.

^q Despatch on Report of Royal Commission of Inquiry into affairs of Mauritius, Com. Pap. 1887, v. 58, p. 349.

^r See Forsyth, Const. Cases, pp.

The
governor.

In 1868, in New Zealand, a question arose concerning the position and powers of the governor and his constitutional advisers in the suppression of local disturbances : whether they were free to have recourse to martial law and other extreme measures, without the direct authority, or at least the subsequent sanction of the provincial legislature.

At first it was a general impression that for any such unauthorised proceedings the local officers were liable to prosecution under certain imperial statutes ; but the issue of the proceedings taken against Governor Eyre, of Jamaica, in 1868, established the validity of colonial Acts of Indemnity. The imperial law-courts decided that such enactments were as effectual in England as in the colony, wherein they had been passed.^s This relieved the governor from personal responsibility where he had acted in good faith and upon ministerial advice, though he might have committed errors of judgment.^t

In 1877, however, a case occurred in Jamaica wherein the governor, acting under the advice of the attorney-general—which was afterwards approved by the Imperial Government—seized a vessel, 'The Florence,' in a port of the island, upon the assumption that it contained goods contraband of war. The owners of the ship brought an action against the governor for unlawfully detaining the vessel and its cargo of ammunition. The governor pleaded that the seizure was an act of State ; but his defence was overruled by the colonial court, which decided that the governor's action had been unjustifiable. This decision was confirmed by the Privy Council, and the governor was condemned in damages and costs, amounting to 8,000*l*.^u

The Colonial Office approved of the governor's conduct, and, accordingly, directed that the above amount should be charged to colonial funds. The legislative council, however, which consisted of twenty members, equally composed of 'official' and 'non-official' persons, protested against the passing of a vote for this sum, and it was accordingly rejected. The Colonial Office then requested the Treasury to apply to Parliament to vote one half the amount,

84 88; Tarring, *Law on the Colonies*, pp. 30-40. And see the Imperial Act 11 William III. c. 12 (which is still in force), 'to punish Governors of Plantations in this kingdom for crimes by them committed in the Plantations;' also, 42 Geo. III. c. 85; and the Act 13 Geo. III. c. 63, sec. 39. And see a memorandum by the Marquis of Normanby,

governor of New Zealand, to the premier of the colony, dated June 17, 1878, in the *New Zealand Gazette* of June 21, 1878.

^s *Phillips v. Eyre*, L. R. 4 Q. B. 225; 6 Q. B. 1.

^t *N. Zealand House Jour.* 1870, Appx. A. No. 1, pp. 10-13, A. 1. a. p. 9.

^u 5 L. R. App. p. 102.

with the understanding that the colony should pay the other moiety. To insure the success of this plan the 'official members' of the legislative council were notified that it was their duty to support the Government proposition. By this means the vote was carried. Thereupon all the non-official members resigned. The whole matter was discussed in the House of Commons on March 9, 1883. The under secretary of state for the colonies defended the action of the Government. He showed that, by a circular issued from the Colonial Office in August, 1868, the relations between official and non-official members of council in Crown colonies were regulated and defined. It was therein laid down that in such a constitution 'the power of the Crown, if pressed to its extreme limit, was sufficient to overcome every resistance that might be made to it'—in other words, to secure to the executive government a majority in the legislative council. If any nominated or salaried member of council could not support the Government in the legislature, he should resign. For 'in Jamaica, as in all other colonies and countries in which the Government is represented in the legislature by its officers having seats and votes therein, it is essential that those officers, whatever proportion they may bear to the total number of the chamber, shall vote together on all questions in respect of which the policy of the Government has been decided.' It was right that Jamaica, which contributed nothing towards its military defence, should share the cost of the present expenditure, which arose out of the provisions of a local statute.^v After this explanation the matter was dropped.^w

Speaking of the legal liability of a colonial governor, Sir W. R. Anson^x says: 'He can be sued in the courts of the colony in the ordinary forms of procedure. Whether the cause of action spring from liabilities incurred by him in his private or in his public capacity, this rule would appear to hold good. Though he represents the Crown, he has none of the legal irresponsibility of the sovereign within the compass of his delegated and limited sovereignty.'

Throughout the British empire—even in colonies where self-government has been conceded to the fullest extent compatible with the maintenance of imperial supremacy—there is a reservation of the paramount

Reserved
imperial
authority.

^v Despatch Dec. 16, 1882. Com. Custom of the Constitution, part 2. Pap. 1882, v. 46, p. 123. The Crown, p. 262, London, 1892.

^w Hans. D., v. 276, pp. 1939–1967. Hill v. Bigge, 3 Moore P. C., 465; Musgrave v. Pulido, 5 L. R. App.

^x Anson, Sir W. R., Law and 102.

Reserved
imperial
authority.

authority of Parliament, and of the right of every British subject to appeal to that tribunal. But while the ultimate control, alike over colonial and imperial administration, is vested by the Constitution in the Imperial Parliament, which is at all times ready to listen to complaints of an undue exercise of power on the part of any minister of the Crown, that supreme authority may be constitutionally invoked only in extreme cases, and enforced only when it is indispensably necessary to maintain the integrity of the empire.^y

Moreover, certain prerogatives of the Crown are suitably reserved in every colony to the direct and immediate expression of the royal pleasure thereon. The powers so reserved differ according to the position and circumstances of the particular colony; but they invariably include the abstract right of dealing with all colonial legislation, and of disallowing such acts as may be deemed objectionable, or in direct opposition to imperial policy.^z Sometimes, colonial laws which, for defect in form or substance, might otherwise need to be disallowed, are remitted to the colony wherein they were enacted, accompanied by a despatch from the secretary of state for the colonies, suggesting their modification or repeal.^a The judicial prerogative of the Crown, or the right of determining in the last resort all controversies between subjects in every part of the empire, has been universally reserved, as being one of the most stable safeguards, and most beneficial acts of sovereign power.^b The administration of the prerogatives of mercy and of honour is either reserved to the Crown or is made the subject of special and limited

^y See Secretary Cardwell's despatch to Governor Eyre, dated Dec. 1, 1865, in Com. Pap. (on Jamaica), 1866, v. 51, p. 250;

Forsyth's cases, p. 21.

^z Col. Reg. 1891, Nos. 32, 48.

^a Mills, Col. Const. p. 5.

^b *Ib.* p. 47.

delegation. Finally, all questions which involve the relations of British dependencies, and consequently of the United Kingdom itself, with foreign states—the formation of treaties and alliances; the naturalisation of aliens; the declaration of war or peace, and, by consequence, all regulations affecting the disposition or control of imperial military forces—are, invariably and for obvious reasons, reserved for the direction and control of the parent state.^c

The governor of every British colony, as representing the authority of the Crown therein, is appropriately entrusted with the exercise of all lawful powers of control over all public officers, whether civil or military, within the limits of his government; and he is ordinarily nominated as captain-general, commander-in-chief, and vice-admiral therein.^d But, though he may be styled commander-in-chief, he is not thereby invested, without a special appointment from the sovereign, with the command of the regular forces in the colony. In military matters, he must act in concert with the officer in command of the forces, who, in the event of the colony being invaded or assailed by a foreign enemy, and becoming the scene of active military operations, assumes the entire military control of the troops.^e

The governor.

8

In colonies possessing responsible government, the ordinary control over civil servants—including their nomination, appointment, and removal from office—is practically vested in the hands of the local administration. Appointments are made, in such colonies, by the governor, with the advice of his executive

Civil servants.

^c Mills, Col. Const. p. 48.

^d *Ib.* pp. 24-26. See Stokes, Const. of the British Colonies in America (published in 1783), Ch. IV. And see the terms of the several

commissions and letters-patent constituting the office of governor in different colonies.

^e Col. Reg. 1892, secs. 10-20. And see *post*, p. 375.

Civil
service.

council; and they do not require confirmation by the imperial government. And the governor, acting by and with his council, possesses the absolute right of suspending or dismissing all public servants who hold office during pleasure.^f While the governor is free to suggest or remonstrate with his ministers, when requested to give the sanction of the Crown in cases of appointments or removals from office, it is only under very exceptional circumstances that he would be justified in disregarding the recommendation of his responsible advisers on such subjects.^g

In the Australian colonies, with a view to secure the proper independence of the two houses of the legislature, it has been customary, by the combined action of statute law and parliamentary usage, to allow all the officers and clerks in each house to be appointed on the nomination of the speaker.^h

In Canada the clerk, chaplain, serjeant-at-arms, and usher of the black rod of the senate, are appointed by the Crown, and the other officials of the house by the committee on contingent accounts. In the House of Commons the clerk and serjeant-at-arms are Crown appointments, but the remainder of the staff are appointed by the speaker.ⁱ

In the case of offices not of a political nature, it is, however, highly inexpedient, improper, and at variance with the constitutional practice of the mother country to remove individuals from office from political motives,

^f Col. Reg. 1892, secs. 4, 30, 63.

^g Hon. E. B. Chandler's case (New Brunswick Assem. Jour. 1862, pp. 192-196). See Governor Musgrave's message to the Legislative Council of South Australia, in reply to their address remonstrating against a certain appointment, in alleged violation of the Civil Service Act. (South Australian Parl. Proc. 1875, v. 1. p. 27.) And see the case of the civil servants dismissed in Victoria, in 1878, and the despatch addressed by the Imperial Government to Governor Bowen, disapproving of his sanctioning these

dismissals. (*Post*, p. 736.)

^h Vict. Leg. Coun., Votes 1880-81; App. D, 5. *Ib.* 1881, D, 4.

ⁱ Bourinot's Parl. Proc. and Practice, Montreal, 1892, pp. 202-222; *vide* speech of Rt. Hon. Sir J. Macdonald (premier) in debate in the Canadian House of Commons on the dismissal of officials of the house, caused by the speaker of an expiring parliament having made appointments that were not subsequently recognised by the speaker of the new parliament, Com. Deb. Sess. 1879, v. 1. pp. 35, 38.

or for any cause other than incompetency or official misconduct. No disability from voting in parliamentary elections is now imposed upon any servants of the Crown in the United Kingdom, except in the case of the Royal Irish constabulary, the county constabulary, the borough and metropolitan police, who are severally disqualified from voting in the localities wherein they serve.^k But an active interference in political contests, in opposition to the existing administration, would constitute a sufficient offence to justify the removal of any public officer.^l

The security afforded to the public interests, on the other hand, by rendering the permanent heads of departments directly responsible to prevent irregular expenditure, though authorised by a minister of the Crown, is strikingly exemplified in a report by a select committee of the Queensland Assembly, on July 31, 1877, upon abuses in connection with 'government advertising'; which report was afterwards adopted by the house.^m

By 76 rule of the Colonial Regulations all salaried public officers are prohibited from engaging in trade, or connecting themselves with any commercial undertaking, without leave from the governor, approved by the secretary of state. This specially applies to officers whose remuneration is fixed on the assumption that their whole time is at the disposal of government.

^k Rogers on Elections, Part I., ed. 1890, pp. 174-177.

^l Earl Grey's despatch to the governor of Nova Scotia, of Nov. 13, 1848; and Duke of Newcastle's despatch, in 1860, in the case of Mr. P. S. Hamilton, of Nova Scotia, cited in Todd, *Parl. Govt.* v. 1, p. 391, *n.*, new ed. p. 632 *n.* In South Australia, officers of the civil service are expressly enjoined, by regulation, under the Civil Service Act, to take no part in political affairs

beyond the exercise of the elective franchise. (*S. Austral. Assem. Votes and Proc.* 1877, p. 59.) A resolution to this effect was negatived by the Assembly of Queensland on Sept. 6, 1877. In regard to existing operation of a Canadian statute, passed before Confederation, forbidding certain public officers from voting at elections, see cases cited in Doutre, *Const. of Canada*, p. 112.

^m Queensland Leg. Assem. Jour. 1877, v. 1, pp. 315, 715.

Civil
service.

If the colonies generally the civil service is regulated by statutes framed upon principles adopted in the mother country for appointment and control of employes in the public service, including the superannuation of officers and servants at the close of their official career.^a In some colonies the system of superannuation does not prevail, or only partially so.^o

In Canada, by Chapter 18, Revised Statutes, 1886, superannuation is provided for in the civil service. An official, retiring after ten years' service, is entitled to an allowance of ten-fiftieths, and a further additional fiftieth of such average salary for each additional year of service up to thirty-five years. To a person entering the service after the age of thirty-five, with special qualifications, years—not exceeding ten—may be added on which the allowance shall be computed.

In Victoria pensions were allowed to all grades in the public service up to the passing of the Act 45 Vic., No. 710, which abolished pensions, saving the rights of those in the service prior to the passing of the Act, and of judges and members of the police force. These latter have a special superannuation fund to which their salary contributes.

In New South Wales, by Civil Service Act, 1884, No. 24, provision is made for superannuation to an officer who has served for fifteen years at the rate of one-fourth of his annual allowance and one-sixtieth added for each additional year, which is not to exceed two thirds of his annual salary.

In Western Australia, by Act 7 of 1871, superannuation is granted to an official who has served ten years at the rate of ten-sixtieths of the annual salary and one-sixtieth ceded for each additional year's service up to forty years. In Tasmania no pension prevails, and, saving vested rights, pensions were abolished in South Australia by Act of 1881, and in New Zealand by Act of 1871.

In Queensland pensions were given under Civil Service Act 1863, but this Act was repealed in 1869, 33 Vic., No. 3. In 1889, however, by Civil Service Act, No. 10, sec. 48, a retiring allowance is provided for as follows :—Any officer who has served fifteen years receives a superannuation allowance equal to one-fourth of his

^a See New Zealand House Jour. 1881, App. A. 2, p. 2, Can. Stat. 1882, c. 4.

^o South Aust. Parl. Proc. 1881, App. 144; *ib.* 1882, App. 106; Stat. 1881, No. 231.

annual salary, with an addition of one-sixtieth of his salary for each additional year of service, but in no case is superannuation to exceed two-thirds of salary. Civil service.

In the Cape of Good Hope the scale of superannuation is similar to that of Western Australia, only provision is made for the pension of widows of officers, one per centum yearly in advance, or $2\frac{1}{2}$ per cent. added, if monthly, being deducted from the salaries of officials desirous of making such provisions for their wives. The Acts governing superannuation are 1885, No. 42; 1886, No. 23; 1888, No. 31; 1879, No. 22; 1880, No. 3; 1882, No. 14; 1891, No. 5.

In Natal, by statute No. 22 of 1874, pensions are provided for Civil Service, the maximum rate being one-sixtieth of the salary multiplied by the number of years computed according to the following table, provided that no pension shall exceed two-thirds of the salary :—

Actual Service under Government	Period which may be Added to Actual Services under Government in Computing Pensions.
10 years, and under 15 years .	5 years
15 " 20 " .	7 years
20 " and upwards . .	10 years

In certain of the British colonies, particularly in the old colonies in North America, the governor in council was empowered, by his commission and instructions, issued under the royal prerogative, to sit as a Court of Error and Appeal for the trial of civil causes.^p This jurisdiction has been repeatedly recognised and confirmed by imperial as well as by local legislation. And in Prince Edward Island, by a local statute, original jurisdiction was expressly conferred on the governor in council in matters of divorce. Governor in council as a court of error and appeal.

But in the commissions and instructions issued to colonial governors of late years, especially in colonies possessing representative institutions, such as Canada, at least since the passing of the B. N. A. Act, no mention is made of appeals.

It is clear that when instructions from the Crown,

^p See Stokes on the Colonies, p. 222.

issued by prerogative right, authorising a governor to assume such functions, were no longer given, the right of the governor in council to hear appeals ceased to exist, unless, by positive enactment, the governor in council should have been duly constituted a court for this purpose, when such powers would continue so long as the law remained in force.^a

Removal
of judges.

A remarkable instance of the continuance of such powers, exercisable under the direct authority of the Imperial Parliament, is afforded by the Imperial Act 22, Geo. III., c. 75, which empowers the governor and council of any British colony to remove from office any person holding an office granted or grantable by patent from the **Crown**, who 'shall neglect the duty of such office, or otherwise misbehave therein.' This statute, it has been decided by the Judicial Committee of the Privy Council, applies to offices held for life, or for a certain term, and not to offices held merely during pleasure. It distinctly applies to colonial judges, irrespective of the particular tenure by which they hold office, and has been successfully invoked for their removal from office, in cases where the tedious and elaborate method of procedure by address from the houses of the local parliament had proved abortive or unsatisfactory. At the same time, it secures substantially justice to the person whose conduct has been impugned, by allowing an appeal from the decision against him to the Crown in council.^r

In Canada, by the 99 sec. of the British North America Act, judges are removable by the governor-general on address of the Senate and House of Commons.

In the Cape, New South Wales, New Zealand, Queensland, Tas-

^a See authorities cited in Kelly v. Sullivan, 1 Canada Sup. Ct. Rep. 12-33. See also Tasmanian Assem. Jour. 1878, v. 35 App. 130, pp. 5, 13.

^r See Todd, Parl. Govt. in Eng v. 2, pp. 746-764; new ed. pp. 880-906; Com. Pap. 1870, v. 49, p. 440; Can. Law Jour. v. 17, p. 445; *ib.* v. 18, p. 74.

mania, Victoria, and Western Australia, this practice of removing a judge by address of both houses prevails ; but in Victoria the governor, with advice of the executive, may suspend a judge for incapacity, neglect of duty, &c., until the pleasure of her Majesty be known ; while in Queensland, by Act 1891, No. 33, district court judges can be removed by the governor in council for inability or misbehaviour.

In South Australia and Natal the governor in council has power to remove judges.

In colonies wherein responsible government is established, the administration of public affairs is conducted, as elsewhere, through the agency of a governor and an executive council. But, while the outward organisation remains unchanged, effect is usually given to the system of ministerial responsibility, when it is introduced into any colony, by means of special instructions, authorising the same, which are transmitted to the governor by her Majesty's colonial secretary,^s

Governor
and
council.

As a practical result of such instructions, it is customary to provide that, under the new polity, when formally introduced into a colony, the executive council shall not be assembled, as under the old system, for the purpose of consultation and discussion with the governor, but that ministers shall be at liberty to deliberate on all questions of ministerial policy in private, after the example of the cabinet council in England ; and that the executive council, privy council, or by whatsoever name the official council of ministers is known, shall only be convened for purposes required by law, or when it may be necessary to hold consultations unconnected with party politics.^t

The practice in Canada, for a number of years, has been that the business in council is done in the absence of the governor. On very exceptional occasions, the

^s See *ante*, p. 28.

^t Com. Pap. 1860, v. 46, p. 244. In the early days of responsible government in Canada, the governor used to debate with his ministers in

council ; but this irregular proceeding was soon abandoned. (Walrond's Letters of Lord Elgin, p. 116.)

Governor
and
council.

governor may preside; but these would occur only at intervals of years, and would probably be for the purpose of taking a formal decision on some extraordinary matter, and not for deliberation thereon. The mode in which business is done is by report to the governor of the recommendations of the council sitting as a committee, sent to the governor for his consideration, discussed, when necessary, between the governor and the premier, and made operative by being marked 'approved' by the governor. This system is in accordance with constitutional principles, and is found very convenient in practice;^u although, in the colonies generally it is customary (after the example of the mother country) for the governor to be present whenever the action of 'the governor in council' is required.^w But every governor is invested by the royal instructions with ample powers that 'if, in any case,' he should 'see sufficient cause to dissent from the opinion of the major part or of the whole' of his executive council, or privy council, as the case may be, 'it shall be competent' for him to execute the functions and authorities vested in him by his commission from the Crown, and by his instructions, as aforesaid, 'in opposition to such their opinion'; provided only that it shall be always competent to any member of his council to record at length, on the council minutes, 'the grounds and reasons of any advice or opinion he may give upon any question brought under the consideration of such council.'^x

In conformity with imperial practice, it devolves

^u Report of Mr. Edward Blake, minister of justice for Canada, Sept. 5, 1876, in Canada Sess. Pap. 1877, No. 13, p. 8, and see *post*, p. 453. But see exception taken to this practice by the Chief Justice of British Columbia, in *Morne v.*

Morison, Can. Law Jour. v. 18, p. 314.

^w Forsyth, *Opinions*, p. 78.

^x See the ordinary commissions and instructions to governors, cited *post*, p. 117.

upon the governor in council, from time to time, to make orders and regulations, for giving effect to laws passed by the local parliament, and for other purposes, in connection with the administration of public affairs in the colony. It is not in accordance with the usages of the constitution that the actions of the governor in council should be formally submitted for the approval of parliament.^y

The result of the great constitutional reform in colonial government, which was effected by the introduction of 'responsible government,' is briefly this: that, while the governor of a colony under the parliamentary system remains, as formerly, personally responsible to the Crown, through the secretary of state, for the faithful and efficient discharge of his high trust, in obedience to the instructions conveyed to him for his guidance, the members of his executive council, who are his constitutional advisers, now share—and, so far as the colony is concerned, entirely assume—the responsibility, which previously devolved upon the governor exclusively, of framing the policy of the local government; of embodying the same in measures for the sanction of the legislature; of making appointments to office; and of superintending and controlling all public affairs through the appropriate departments of state in the colony.

Responsible government.

Each member of the executive council (or, as they are termed in Canada, the privy council) is required, on his appointment, to take the customary oaths of office.^z These oaths invariably include the oath of allegiance and an oath of secrecy.^a Since the issue of the revised form of letters patent, and of royal instructions,

Privy or executive council.

^y Queensland Leg. Council Jour. 1875, p. 120.

^a See Lower Can. Assem. Jour. 1835-6, p. 422, and Todd, Parl. Govt. v. 2, p. 55, new ed. p. 83.

^z Col. Reg. 1891, No. 62; B. N. A. Act, 1867, sec. 11.

Responsible
government.

it has been held that it is no longer necessary for the members of the executive council to be re-appointed, and to be again sworn on the appointment of a new governor.^b In Canada, the ministers are not specially re-appointed by a new governor-general, but a proclamation is issued, announcing the assumption of office by the governor and commanding all her Majesty's officers and ministers to continue in their respective offices.^c

✓ The responsibility of the local administration for all acts of government is absolute and unqualified. But it is essentially a responsibility to the legislature,—and especially to the popular chamber thereof,—whilst the responsibility of the governor is solely to the Crown. It is indispensable to the welfare and good government of the colony that these separate responsibilities should never be permitted to clash; and the best guarantee against the possible occurrence of such an event is to be found in the continued existence of the most cordial and unreserved harmony and co-operation between the governor and his advisers.^d

It is undoubtedly incumbent upon a constitutional governor to co-operate honourably, though in no partisan spirit, with his ministers for the time being, and to accept their advice on all public matters, unless he should see sufficient cause to justify him in refusing to concur in their recommendations. On the other hand, every objection raised by the governor to a policy or proceeding submitted for his approval should be considered by his ministers with the deference and respect due to his office. In the free interchange of opinion between those who are equally concerned in the en-

^b New Zealand House Jour. 1881, App. A. 1, p. 17; A. 2, p. 25.

^d See New South Wales Leg. Assem. Votes and Proc. 1859-60,

^c Canada Gazette, June 16, v. 1, p. 1130. 1888.

deavour to promote the public good, it is reasonable to suppose that a unity of sentiment would ultimately prevail.

But, if it should prove otherwise, it must be always remembered that the governor is not bound to comply with the advice of his ministers. In the event of a recommendation being submitted to him that involved a breach of the law, or that was contrary to express instructions received from the Crown, he would be obliged to refuse to sanction it. For no violation of the law could be excused on the plea that it was advised by others; the governor must be held personally answerable for the same to the imperial authority, or to a court of competent jurisdiction, taking cognisance thereof; unless, indeed, the case should have been one of such urgent and imperative necessity as would warrant a departure from the laws of the land, and would justify a subsequent application to Parliament for an act of indemnity.

Reserved
powers of
a consti-
tutional
governor.

One reason for granting a discretion to the governor is that his power of action cannot properly be more limited than that of the sovereign herself in relation to imperial affairs. It is obvious that the necessity of fulfilling our international obligations and protecting imperial interests would alone be a sufficient reason for objecting to any provisions which might be construed as absolutely binding the governor to accept any advice tendered to him by his ministers for the time being.^e

In the ordinary exercise of his constitutional discretion, a governor is unquestionably competent to reject the advice of his ministers, whenever that advice should seem to him to be adverse to the public welfare, or of an injurious tendency. In such a contingency, if no compromise be possible, either the resignation or the dismissal of ministers must ensue. The governor

^e Colonial Secretary Lord Knuts- tralia. Com. Pap. 1891, C. 6487, p.
ford to Governor of Western Aus- 72.

Reserved
powers of
a consti-
tutional
governor.

must then seek for other advisers. If he succeeds in obtaining a new ministry, who are willing to become responsible for his act which led to the retirement of their predecessors, and if the new administration is sustained by the popular chamber, there is no further difficulty. But if the local assembly refuse to give their confidence to the incoming ministry, and if a dissolution of Parliament (should that take place) fails to give them adequate support, the governor must either recede from the position he had taken in the first instance or retire from office.^f

Under certain circumstances,—as where the point in dispute involved a question of imperial policy,—the governor would be entitled to invoke the interposition of her Majesty's secretary of state for the colonies, before surrendering the contest. It is, in fact, his duty invariably to communicate to the secretary of state any difference of opinion between himself and his ministers which involves the question of his responsibility to the Crown, in connection with the responsibility of his ministers to the local parliament. If the Crown should decide against the governor, he must yield the point in dispute or resign. If the Crown upholds him, the contest is immediately transferred from the agent to the principal; from the governor to the imperial authority, from whence his powers are derived. In no case is a governor to be held personally responsible to a local parliament for his policy or conduct in office.^g

* Constitutional usage will not permit of any attempt to affix upon the governor of a colony, by either branch of the colonial legislature, a direct personal responsi-

^f See *post*, p. 628, *et seq.*, and especially *post*, p. 635.

^g See despatches between the Marquis of Normanby (governor of New Zealand), and the secretary

of state for the colonies, in *New Zealand Gazette*, 1878, pp. 909, 920. And see Hearn, *Government of England*, p. 128.

bility for public acts of government: all such responsibility should be assumed by his ministers.^h Neither is it constitutional for a local legislature to pass a resolution of censure upon a governor for his conduct in office, 'unless as preliminary to an address to the Crown to remove an obnoxious representative.'ⁱ

Governor not held responsible for acts of legislature.

On May 29, 1878, in the House of Assembly of the Cape of Good Hope, the speaker called attention to certain paragraphs in a motion submitted for the consideration of the house, and ruled that they could not be put from the chair, as they involved a direct censure upon his excellency the governor. The motion was accordingly withdrawn.^k

In the colonies, as in the mother country, it appertains to the head of the executive to select the prime minister, subject to the rules of constitutional practice, which govern in ordinary cases the choice of a premier by the Crown.^l This position may be held in connection with any public department, or even without office.^m

Choice of prime minister.

In New Zealand, in 1882, upon the resignation of the premier, Mr. Hall, on account of ill health, the governor put himself in communication with the leaders on both sides with a view to ascertain the relative strength of rival parties. Having received full information on this subject, and being of opinion that parties were too evenly balanced for either to succeed, the governor requested the attorney-general to undertake the reconstruction of the ministry.ⁿ

Authority to appoint, and to remove from office, an unlimited number of members of the executive council, — 'with reference to the exigences of representative

^h See *post*, p. 660.

ⁱ Governor Frere, in Com. Pap. 1878, v. 56, p. 253; New South Wales Leg. Assem. Votes, 1876-77, v. 1, pp. 25, 273. For the form of a vote of censure upon a governor, in conjunction with a proposed address for his recall, see *ib.* p. 517.

^k See *post*, p. 885.

^l See *ante*, p. 17; Todd, Parl. Govt. v. 2, p. 146, new ed. p. 183.

^m In Tasmania it is not unusual for the premier to hold no departmental office.—Tasmanian Statistics, 1881, pp. 3-5.

ⁿ The Colonies, June 2, 1882, p. 6.

The executive council, or cabinet.

government,'—is vested in the governor of every colony wherein responsible government has been established, without the necessity for obtaining the concurrence of the home government; and it is understood that councillors who have lost the confidence of the local legislature will tender their resignation to the governor, or discontinue the practical exercise of their functions, in analogy with the usage prevailing in the United Kingdom.^o

As a rule, all outgoing ministers should resign their seats in the executive council, or be formally removed from that body. Hitherto, it has not been deemed expedient to retain ex-cabinet ministers on the list of colonial executive councils, merely as honorary members and in analogy to imperial practice. An organisation resembling the imperial privy council, and liable to be convened on special occasions, or for ceremonial purposes, is not ordinarily required in colonial institutions, which, at the outset at least, should be as simple and practical as possible.^p But, in the Dominion of Canada, the practice prevails that 'the Queen's privy council for Canada'—the members of which are appointed by the governor-general, 'to aid and advise the government,' and are removed at his discretion—are nevertheless permitted to retain an honorary position in the council after their retirement from the cabinet. By command of the Queen, 'members of the privy council, not of the cabinet' have a special precedence within the Dominion, and are permitted to be styled 'Honourable' for life. A similar custom prevails with regard to ex-ministers of the 'executive council,' if of three years' standing, in the colonies of the Cape of Good Hope, Victoria, Queensland, South

^o Col. Reg. 1892, No. 57.

^p Colonial Secretary's (Labouchere) despatches in 1857-58 to

the governor of New South Wales. N. S. Wales Votes and Proc., 1856-60, v. 1, pp. 1135, 1137.

Australia, New South Wales, New Zealand and Tasmania, but not in Western Australia or Natal.

It is of the essence of responsible government that the governor should choose, as his constitutional advisers, persons who already possess, or who can readily obtain, a seat in one or other of the legislative chambers of the colony, in order that they may be the authorised exponents therein of the opinions of government, as well as of the well-understood wishes of the people. It is usual to assign to each of these responsible ministers the charge of a separate department of the state; so as to place the entire public service under the superintendence and control of responsible administrative heads, who possess the confidence of the representative assembly. Nevertheless, pursuant to well-established constitutional practice, it has been everywhere regarded as allowable to strengthen the executive council, or ministry, by the occasional introduction therein of non-official members, without portfolios, or departmental office, but who serve as active members in council, and share equally in the responsibility of their colleagues in the cabinet, provided only that they must possess a seat in parliament.^a

✓ Cabinet ministers in parliament.

It may be of interest to note a few details in regard to the numbers and composition of the various responsible ministries which are now in operation in the principal colonies of Great Britain.

In New South Wales the cabinet originally consisted of five members; it has since been increased to ten.^r

In Victoria the ministry in 1891 was composed of ten members, besides four members in the cabinet without portfolios.^s

^a Leg. Assem. N.S. Wales, Votes and Proc., 1859-60, vol. 1, pp. 1130, 1137. And see Todd, Parl. Govt. v. 2, p. 154, new ed. p. 192. ^r C. O. List, 1892, p. 176. ^s *Ib.* 1891, p. 271.

Cabinets
in the
various
colonies.

In South Australia there are six ministers, including the chief justice.^t

In Tasmania there are usually four cabinet ministers holding office, and one, or sometimes two others without portfolios.^u

In New Zealand the cabinet at present (1892) consists of seven official members;^v though provision was made in 1873 to add to the cabinet two Maori ministers, and the 'Disqualification Act,' 1878, No. 30, sec. 5, makes reference to the executive council, 'two of which number must be Maoris or half-castes.' It appears that the last appointment of a native to this office was in 1879, and he retired from office on October 25 of the same year.

In Queensland there are eight responsible ministers, including one without portfolio.^w

In the Cape of Good Hope there are six cabinet ministers, the premier being without portfolio.^x In the governor's speech on the opening of parliament in 1891, it was announced that a measure would be submitted for the creation of the office of minister of agriculture and Crown lands, in recognition of a wish universally expressed.^y

In May, 1881, upon the resignation of the Sprigg administration, Mr. Scanlen was appointed premier of the Cape colony. There being no member of the bar holding a seat in parliament who was willing to accept the office of attorney-general at his hands, Mr. Scanlen, though a solicitor merely, and not entitled to audience in the Supreme Court, assumed this office himself, but with the avowed intention of retaining it no longer than might be absolutely necessary. The appointment gave rise to some angry discussion, but a vote of censure against it in the local parliament was negatived.^z In June, 1882, Mr. Scanlen announced his intention of exchanging his office of attorney-general for that of colonial secretary and premier.

^t C. O. List, 1892, p. 202.

^u Tasm. Statistics, 1879, p. 3;
C. O. List, 1892, p. 216.

^v C. O. List, 1892, p. 185.

^w *Ib.* p. 190.

^x C. O. List, 1892, p. 82.

^y Cape Votes, 1891, p. 5.

^z Cape Argus, May 17, 1881;
Cape Assem. Votes, May 20, 1881.

In the Dominion of Canada, at the time of confederation in 1867, there were thirteen cabinet ministers; but an Act was passed in 1887, chapter 10, creating a new department of trade and commerce which combined the departments of customs and inland revenue.^a This Act, when put into force, in 1892, reduced the number of ministers to twelve; but under the new department two new offices were created, a controller of customs and a controller of inland revenue;^b being somewhat analogous to under secretaries of state as parliamentary heads of departments; not of the cabinet, but auxiliaries to ministers.^c In the same category as that of the controllers, in not having a seat in the cabinet, is the office of solicitor-general, created by statute in 1887,^d which likewise was not put into force until 1892.

Dominion cabinet.

The cabinet (1893) numbers twelve ministers with portfolios, and two without, besides the three quasi-ministers above mentioned.

In 1873 the legislative assembly of New South Wales agreed to resolutions to render the offices of attorney-general and solicitor-general non-political; but in March, 1878, the assembly reversed their decision, so far as the office of attorney-general was concerned. In New Zealand, by an Act passed in 1876, No. 71, the attorney-general may be either a permanent and non-political officer, or a member of the cabinet, with a seat in parliament, at the discretion of the governor in council. [See the South Australian House of Representatives' Votes, 1871, p. 202, a resolution to the same effect, which became law in 1873, No. 5.] In Canada, so far back as in 1850, the exclusion of the Crown law officers from the cabinet, in conformity with imperial usage, and in order that they might be able to devote more time to their official duties, was advocated by men of special experience and ability.^e

Attorney and solicitor general.

^a Stat. Can. 1887, c. 10.

^b *Ib.* c. 11.

^c Todd, Parl. Govt. in England, new ed. v. 2, p. 316.

^d Stat. Can. 1887, c. 14.

^e Viz., by Mr. J. Hillyard Cameron, Chief Justice Draper, and Mr. J. E. Small. See Leg. Assem. Jour., 1850, App. B. B.

Should
the attor-
ney-gene-
ral sit in
the cabi-
net?

✓ In some of the colonies repeated attempts have been made to render the office of attorney-general non-political. The main reasons alleged for this endeavour are briefly these: that it is contrary to imperial practice for the law officers of the Crown to sit in the cabinet, although they form part of the government, and invariably retire upon a change of ministry;^f that the representative of the Crown should not be obliged to seek for legal advice from law officers who, after advice given, are able, it may be, by a casting-vote in council, to insist upon the same being accepted and carried out; and that, in the conduct of state prosecutions, the interests of justice would be jeopardised by the combination of policy and law in the persons who conduct Crown prosecutions.^g

As a set-off against these objections, it may be observed that in practice it has been customary, at least in Canada, for the attorney-general to fill the office of premier, in most instances since the establishment of responsible government, and that no great difficulty has resulted therefrom at any time. The knowledge of law and of the constitution necessarily possessed by one qualified to fill this responsible office has usually led to his selection for the most prominent position in the ministry. When this has been the case, the conduct of Crown business in the courts is generally assigned to professional men, otherwise disconnected with the government.

Upon the nicer question as to the discretion of a governor who applies for legal advice to law officers who are also cabinet ministers, and has reason to believe that their legal judgment has been unconsciously biassed

^f Todd, *Parl. Govt.* v. 2, p. 162, 166. Forster's *South Australia*, pp. new ed. p. 201. 182, 208. *New Zealand Acts*, 30

^g Judge Boothby's *Memorandum*; *Com. Pap.*, 1862, v. 37, p. Vict. No. 63. *New Zealand Assem. Jour.*, 1870, App. D. No. 32.

by political considerations, so that he cannot accept their interpretation of the law, it should be remembered that a governor is not bound by opinions given under such circumstances, but is free to ask further assistance from elsewhere to aid him in his judgment: with this proviso, however, that, in questions of purely local concern, the governor must finally decide upon his personal responsibility; and whomsoever he may consult, and from whatever source his opinion may be enlightened, he cannot shelter himself behind advice received from any persons outside his own ministers.^h

Governor
free to
seek
advice.

In the colonies of Great Britain under responsible government, members of the popular chamber, upon accepting office, as a rule vacate their seats and require to be re-elected.

Vacation
of seats by
ministers.

In Canada, ever since 1853, ministers of the Crown have been empowered by law to exchange any ministerial office for another without thereby vacating their seat in parliament, provided that not more than one month elapses between the resignation of one office and the acceptance of another.ⁱ It was afterwards decided by Canadian courts that such changes may be made oftener than once within the month, and that they are not limited to changes in an existing administration.^j Changes of ministerial offices are allowed by law in England without affecting the seats of a member of the House of Commons, but such changes must be immediate and limited to changes in the existing government, after the members had been once re-elected.^k In Canada, in 1878, the law was amended, so as to limit this permission to accept a new office without vacating the seat to members of an existing administration.^l

^h See *ante*, pp. 8-11, and *post*, p. 166.

^j See *post*, p. 769.

ⁱ Can. Stat. 20 Vict. c. 22, sec. 7; new edit. p. 337.

^k Todd, Parl. Govt. v. 2, p. 273,

31 Vict. c. 25, sec. 6.

^l Can. Stat. 41 Vic. c. 5, sec. 3.

Vacation
of minis-
terial
seats in
Canada.

And in 1891, on the occasion of the death of the premier, the Right Hon. Sir John A. Macdonald,^m while parliament was in session, the House of Commons adjourned for a week, pending the formation of a new ministry. The Hon. Mr. Abbott, who was a member of the ministry without portfolio, was selected to form the cabinet, which was dissolved through the demise of its leader. The members of the late administration were reinstated in office under their new leader without having to seek re-election.

In the
Australa-
sian colo-
nies.

In South Australia, New Zealand, and Cape of Good Hope, however, a different usage prevails. In these colonies, from the first, members of elective houses have been permitted to accept political office without thereby vacating their seats. This peculiarity in the constitution of these colonies was avowedly introduced in order to save the community from the cost and excitement entailed by frequent elections, and to facilitate the speedy readjustment of offices upon a change of ministry. But the experiment may be considered questionable. By removing an obvious impediment to frequent ministerial changes, it is apt to foster the element of instability, which is one of the most serious evils incident to parliamentary government.ⁿ

In Queensland, on July 20, 1866, a new ministry was formed for the purpose of carrying out a financial policy differing from that upon which their predecessors had resigned office; and as it was deemed to be absolutely necessary that certain financial measures

^m Sir John Macdonald died at Ottawa on June 6, 1891. During the period of his political life, from 1847 to 1891, forty-four years, Sir John held office for thirty-one years. At his death he was accorded a public funeral, and his body lay in state for three days in the senate

chamber.—Can. Votes and Proc. 1891, p. 229.

ⁿ Todd, *Parl. Govt.* v. 2, p. 277, new ed. p. 342; *South Aust. Parl. Proc.* 1869-70, v. 1, p. 146; Rusden, *Hist. of N. Zealand*, v. 1, p. 565, *n.*; *N. Zealand Parl. Deb.* (1876), v. 22, p. 162; *ib.* (1882), v. 41.

should be passed without delay, in order to place the affairs of the colony in a more satisfactory position, the new ministers appeared in the legislative assembly simply as executive councillors, without departmental office, with the understanding that immediately after the passing of those urgent measures they should accept office and go for re-election. The assembly consented, though not without remonstrance from the Opposition to this course. And after these necessary bills were passed the ministers vacated their seats on accepting office.^o

Vacation
of minis-
terial
seats.

In New South Wales, by an Act passed in 1880, the governor in council is authorised to empower any minister (except the attorney-general) to perform the functions of any other member of the executive council when it may be necessary for the public service.^p

In the Cape of Good Hope, where formidable obstructions arose to the introduction, in conformity with the desire of the imperial government, of the system of ministerial responsibility, ministers are not required to vacate their seats in parliament on accepting office. They also enjoy the singular privilege of sitting and debating in either house, but may not vote except in the chamber of which they are elected members.^q

In New South Wales, Victoria, and Queensland, upon a change of government, ministers who retain their former offices, though under a different prime minister, are not required to go for re-election. This is in accordance with English practice.^r

The instability of colonial administrations, and the frequent changes of government and consequent vacil-

^o Queensland Parl. Deb. 1866, pp. 555-572. Votes Cape Assem. May 10, 1881; *post*, p. 95; Dilke, Problems of Greater Britain, p. 289.

^p N. S. Wales Stats. 44 Vic. No. 6.

^r Queensland Leg. Assem. Jour. 1877, v. 1, p. 709.

^q Constitution Ordinance of 1872; Com. Pap. 1873, v. 49, pp. 320, 389;

Brief du-
ration of
colonial
ministries.

lations of policy, have been very striking in the various Australian colonies; not merely in the colonies above-mentioned, but likewise in others, as the following statistics will show: In South Australia, from 1856 to 1890, there were no less than thirty-six successive administrations.^s In New Zealand, from 1856 to 1890, there were twenty-five ministries in succession. In the brief period of seven months ending April 8, 1873, five distinct administrations were formed, of whom the premiers were successively Messrs. Fox, Stafford, Waterhouse, Fox, and Vogel.^t In Queensland, from 1859 to 1890, there were fourteen different administrations. In Victoria, from 1855 to 1890, there were twenty-three different administrations. In Tasmania, from 1856 to 1890, there were nineteen successive administrations. And in New South Wales, from 1856 to 1890, there were twenty-five different ministries.^u In these young and vigorous communities, entrusted with plenary powers of self-government, it is not surprising that, at the outset at least, 'the contests of party and the struggles for office should have occupied so much of the time and energies of the popular assemblies; nor would it be fair to attribute such strife merely to a vulgar greed for place or profit instead of to that honourable ambition to guide the fortunes of their country, upon the existence of which the whole system of popular government can alone hope to be successful.'^v Nevertheless, it may be hoped that these rapidly recurring changes of administration will gradually give place to a more settled order. It is noteworthy to observe that the Dominion of

^s Australian Handbook, 1890, p. 561.

^t New Zealand Papers, 1873, A, 1 a. New Zealand Statistics, 1881, p. 4.

^u For table of administration in

Australian colonies, *vide* Australian Handbook, 1890, pp. 561, 562.

^v Mr. J. E. Fitzgerald's Rep. on Public Revenues in Australia, New Zealand Parl. Pap. 1881, A, 4, p. 25.

Canada has presented a marked contrast to this unstable political condition. Upon the confederation of the British North American provinces in 1867, Sir John A. Macdonald was appointed premier (his ministry having been already in existence in the province of Canada for three years); and he continued prime minister until November 5, 1873, when the Mackenzie administration was formed. This ministry lasted for five years. In 1878 Sir J. A. Macdonald returned to power, bringing with him most of his former colleagues,^w and remained in office till death removed him on June 6, 1891, having but one change of ministry in twenty-seven years.^x

Except in Canada.

In another matter of special constitutional importance, the Dominion of Canada has presented a commendable example to the sister colonies in Australia. Following the practice previously observed, from the first introduction of responsible government into the old province of Canada, it has been customary that at least two members of the cabinet should have seats in the upper house, to take charge of public business therein, and generally to represent the administration in the legislative council, or, as it is now termed, the senate. It is understood that less than two members would not suffice for this purpose; and, upon the formation of the administration, in November, 1878, the number was increased to three—the speaker of the senate being, for the first time since confederation, made a cabinet minister.

Cabinet ministers in the upper house.

^w Can. Parl. Companion, 1879, p. 188. The first responsible ministry in the Cape of Good Hope likewise had a comparatively long tenure of office. It existed from December, 1872, until February, 1878. See *post*, p. 101.

^x See *ante*, p. 60, n. Sir John Macdonald held office covering the

following periods: from May 11, 1847, to March 10, 1848; from Sept. 11, 1854, to July 29, 1858; from Aug. 6, 1858, to May 23, 1862; from March 30, 1864, to Nov. 5, 1873; from Oct., 1878, till his death on June 6, 1891.—Gemmill's Parl. Companion, 1891, p. 150.

Cabinet
ministers
in the
upper
house.

In Australasia it appears generally to have been the rule hitherto to assign but one cabinet minister to the upper chamber. This has repeatedly occasioned difficulty, and has sometimes led to formal complaint.

Thus, in Victoria, during the contentions between the two houses, upon the relative rights of each in matters of supply and taxation—which will be fully considered in a subsequent part of this work,—the only representative of the ministry in the legislative council (the postmaster-general) resigned his office, because he could not agree with his colleagues in the ministry respecting their proposed bill for the reform of the constitution of that chamber. This led to much inconvenience. For although, in Victoria, prior to 1879 it had not been the custom to have more than one departmental minister in the legislative council, and he had rarely filled a very prominent office, yet sometimes a cabinet minister without a portfolio sat in the council. At this time, however, the resignation of the postmaster-general deprived the council of any representative of the government. This circumstance had a natural tendency to identify the council, as a body, with the Opposition in the assembly; whereas a patriotic statesman, filling the honourable position of premier, will readily apprehend that it is ‘the interest, not to say the paramount duty, of every minister so to shape his course as, if possible, to keep the two houses of parliament in harmony, and not to throw himself absolutely and entirely into the hands of one branch of the legislature, regardless of the wishes and feelings of the other.’^y

A committee of the legislative council of Victoria, in conference with a committee of the assembly on constitutional reform, pointed out the necessity that existed for the constant presence of at least two—

^y Earl of Derby, *Hans. D.* v. 184, p. 840.

and, if possible more—responsible ministers in the legislative council. They believed ‘that such a rule, if it were habitually observed, would, as it has done in England, promote the harmonious working of the two houses, would facilitate legislation, and divide its labours; and would tend to prevent the danger of collision between the houses, by transferring to the cabinet, in conformity with constitutional theory and usage, the most numerous and the most serious causes of dispute.’²

Ministers
in the
upper
house.

Since 1880 there has been a change in this respect, and more importance has been attached to ministers being in the upper house, especially subsequent to its reform and enlargement. The number of ministers in the upper house has varied as follows :—

In Mr. Service's ministry, 1880 . . .	there were two
„ Mr. Berry's ministry, 1880-1 . . .	„ none
„ Sir B. O'Loughlen's ministry, 1881-3 . . .	„ two
„ Mr. Service's second ministry, 1883-6 . . .	„ three
„ Mr. Gillies' ministry, 1886-90 . . .	„ three
„ Mr. Munro's ministry, 1890-92 . . .	„ four
„ Mr. Shiel's ministry (present) . . .	there is one

By the Constitution Act Amendment Act, 1890, sec. 13, ten ministers of the Crown may have seats in parliament. Four at least must have seats, and not more than eight can sit in the assembly.³

In New Zealand, up to the passing of the Disqualification Act of 1876, it had been customary to have two official ministers—or, at least, one minister holding office, and another without a portfolio—to represent the government in the legislative council. But, by the operation of the Act aforesaid, the ministry considered themselves debarred from assigning to more than one legislative councillor a cabinet seat. Whereupon the legislative council, on October 10, 1876, resolved, ‘that it is desirable that the government of the

² Com. Pap., 1878-79, v. 51, pp. 460, 496, 572.

³ Memo. from the Agent-General of Victoria.

colony should be represented in this council by *at least* two responsible ministers.' No effect having been given to this resolution, a bill was brought into the legislative council, on behalf of the government, on August 16, 1878, to authorise the appointment of a second minister, not being a salaried officer, expressly to assist the government in the legislative council. This bill passed the council, but was laid aside in the house of representatives,^b and so far (1892) no change has been accomplished.

Extraor-
dinary
proceed-
ing in
South
Australia.

In South Australia, for about three months in the session of 1877, the legislative council, because they disapproved of the public conduct of the chief secretary, who was the only minister sitting in that chamber, resolved that the control of public business should be taken out of his hands, and entrusted to a member of the Opposition. This extraordinary proceeding was protested against by ministers, and also by the governor, as being an infringement upon the prerogative of the Crown. The council, however, adhered to their determination; and this unprecedented state of affairs continued until the downfall of the ministry; when the Opposition, succeeding to power, assigned the position of leader of the government in the legislative council to the man who had been chosen by the council themselves to fill that office.^c The custom of having but one minister in the upper chamber so far (1892) has remained unchanged.

Further points of interest concerning upper chambers in the colonies, and their relation to the representative assemblies, will come before us, in a subsequent chapter, descriptive of the constitution and powers of colonial parliaments.

^b New Zealand Parl. Deb. v. 28, *post*, p. 713. And see S. Austral. p. 294; v. 30, p. 699.

^c See the particulars of this case,

Leg. Coun. Minutes, June 3, 1879.

Wherever parliamentary government has been established, the determination of all political and party questions, and the adjudication upon complaints against the existing administration, should be reserved for the consideration of the legislature, in parliament assembled. A defeated minority is not entitled, after a prorogation or dissolution of parliament, to appeal either to the governor of the colony or to the imperial government to interpose, for the purpose of giving immediate effect to an assumed change in public sentiment, and to place the reins of government in the hands of other leaders, on the plea that their party have obtained a majority at the polls, or that the remonstrants do, in fact, constitute a majority of the popular chamber. Addresses or petitions, for such a purpose, although they may emanate from members of the legislature in their individual capacity, are highly irregular, and objectionable in principle. Complaints against ministers of the Crown, on matters affecting the performance of their public duty, ought not to be pressed upon the attention of the governor or of the imperial authorities, during a parliamentary recess; but should be formulated in conformity with the ordinary rules of parliamentary procedure, and submitted to the consideration of the local parliament, at the first available opportunity, when they can be regularly investigated and decided upon, in accordance with the usages of the constitution.^a

Political complaints to be disposed of in parliament.

In 1871, fifteen members of the parliamentary Opposition in Queensland addressed the governor, remonstrating against the conduct of the administration

^a See Correspondence of Governor Mulgrave with the colonial secretary, in 1859, Nova Scotia Leg. Council Jour., 1860, app. p. 59; Queensland Leg. Assem. Votes and Proc. 2nd Sess., 1867, v. 1. p. 628; and the answer of Earl Duf-

ferin, governor-general of Canada, to a deputation of members of the Canadian Parliament, on Aug. 13, 1873; in Canada Com. Jour. 2nd Sess., 1873, p. 30, and in the Imperial Com. Pap., 1874, v. 45, pp. 25-30, and *ib.* p. 265.

Parlia-
mentary
dead-lock
in Queens-
land.

(who were only sustained in office by a majority of one). In their own defence, ministers pleaded that the violence and obstructiveness of the Opposition had prevented them from proceeding with the public business, and compelled them to ask for a dissolution of parliament. A dissolution was granted. It resulted in a considerable increase of the ministerial majority. Nevertheless the Opposition continued to obstruct, and on May 14, 1872, twelve of the Opposition members renewed their previous application to the governor, and invoked his interference. The governor (the Marquis of Normanby) replied to this memorial on May 18. He exposed the fallacy of certain arguments adduced by the remonstrants, and said he 'must decline to accept the opinion of twelve members as the decision of a house constituted of thirty-two representatives of the people.'

He pointedly remarked that 'the Opposition may obstruct the passing of a bill . . . by resorting to the forms of the house to prevent the progress of public business, but until they secure a majority they cannot alter the law; for, if there is one principle more firmly established than another in the British constitution, it is that the majority, and not the minority, of the representatives of the people, in parliament assembled, shall direct the conduct of public affairs; and it is a perversion of the first rules of any constitutional government, to say that a minority have a right, by the obstruction of public business, through the forms of the house, to coerce the majority. Such a rule, once admitted, must evidently render representative government impossible.'^e In conclusion, his Excellency observed that 'the Opposition, while pressing their views so strongly, must

^e On this point see May, *Parl. Prac. ed.* 1883, p. 380; Amos, *Eng. Const.* p. 84.

remember that others have claims to consideration besides themselves. I shall always be found ready to pay the greatest deference to the opinion of parliament, but that opinion must be expressed by the majority of the assembly in their legislative capacity, and not by a minority without the walls of the house of assembly.’^f

Parliamentary
dead-lock
in Queens-
land.

Lord Normanby, in reporting these occurrences to the secretary of state, declared that much as he deplored the interruption to public business, resulting from the parliamentary dead-lock which had taken place, through the unjustifiable proceedings of the minority in the assembly, he felt that he should not be justified in withholding from his government his entire approval of their conduct. In reply, Lord Kimberley expressed his entire approval of the governor’s reply to the memorialists, and his satisfaction at learning that it had been followed by the withdrawal, upon that occasion, of any further opposition to the transaction of business in the assembly.^g

Upon the re-assembling of parliament, in May 1873, a motion of want of confidence was moved, as an amendment to the address, in reply to the speech from the throne. After a prolonged debate, the amendment was negatived, and the address agreed to, but only by the casting vote of the Speaker. In giving this vote, he said, ‘I am influenced by the belief, that in the determination of a question of purely party character, obviously raised for the purpose of displacing a government, it would not be in accordance with my duty to throw my weight into the scale, in such a way as to manifest party predilection, or to precipitate the result aimed at.’^h

^f Queensland Leg. Council Jour. 1872, pp. 711–726.

^g *Id.* 1873, p. 71.

^h Queensland Assem. Jour. 1873, p. 18.

Legisla-
tive
obstruc-
tion.

No further party strife was exhibited during the rest of this session, which was prorogued on July 15, to be followed by immediate dissolution, for the purpose of giving effect to an Act enlarging the basis of representation.

Regarding the meeting, adjournment, and general duration of sittings of the representative chambers, and in proceedings for abridging or summarily terminating debate—in Queensland and in New Zealand—a description is given in *Imperial Commons Papers* 1881, vol. 74. It appears that proceedings, in the nature of the 'cloture,' are authorised only in the legislative council at the Cape and in the assembly of South Australia. Such a rule was in force in the assembly of Victoria in the session of 1875-6 only, and in the New Zealand house of representatives for some years prior to 1863, when the rule was expunged. Nevertheless, in September 1881, the New Zealand house of representatives dealt summarily and successfully in putting down persistent obstruction by a small body of its members. They had been kept continuously sitting from 2.30 P.M. on Wednesday, August 31, until five minutes to 5 P.M. on Saturday, September 3, in committee of the whole, after a forty-eight hours' sitting, during which twenty-three motions, alternately to report progress and to leave the chair, had been negatived. The chairman interposed and refused to receive any more such motions. A member resisted his authority, whereupon he left the chair and reported the disorderly conduct to the house. The house resolved this member to have been guilty of contempt. Then the speaker severely reprimanded him, and in so doing he dealt a severe and sufficient blow against this defiance of decorum and abuse of the freedom of debate. He asserted and maintained the inherent right of the house to control its own rules and not permit them to be notoriously abused.¹

Modern constitutional practice has sanctioned a deviation from the rule which forbids an appeal to any other tribunal than that of Parliament itself

¹ See *The Colonies*, Oct. 29, 1881, p. 709; *House Jour.* 1881, pp. 246-257. The same view is expressed by Prof. J. E. T. Rogers in *Con. Rev.* v. 41, p. 507, wherein he shows that ancient rules of the house in 1604 and 1610 clothe the Speaker

with all needful power to suppress irrelevant speaking and manifest obstruction. See also article reviewing new rules of procedure in *West. Rev.* v. 62, p. 493. See also Mr. Pollock's paper in *Fort. Rev.* v. 30, p. 497.

to decide upon the fate of ministries. Up to the year 1868, 'the general current of precedent' was decidedly 'in favour of a minister, beaten at a general election, accepting his defeat only at the hands of Parliament; and this custom was grounded on the salutary doctrine that it is only through Parliament that the nation can speak.'^j

Resignation of a ministry after defeat at the hustings.

But, in 1868, and in 1880, the conservative administrations, and in 1874, the Gladstone administration, respectively resigned office, soon after the adverse result of their appeal to the constituencies was apparent.^k In 1892, however, the Salisbury administration adopted the old method of accepting defeat in Parliament. Before the elections, the conservative majority stood 116; after it, the opposition were shown to have a majority of 40; the government being defeated on the Address, August 11, 1892.^l

So likewise, in Victoria, upon the defeat of the McCulloch ministry at the general election on May 11, 1877, the administration resigned on May 21, the day previous to the meeting of the new parliament. In like manner the Berry ministry, in March, 1880, resigned after a general election and without meeting parliament. And in Canada—shortly after the general election, held in September, 1878, and which resulted in the defeat of the Reform party at the hustings—the Mackenzie administration resigned, and were replaced by the Conservative administration of Sir John A. Macdonald. The new parliament met, at about the usual period, in February, 1879.

Mr. E. A. Freeman views these precedents as introducing a new principle into the unwritten constitution of England, by means of which the direct action of the electors at their polling-booths is capable of effecting a change of ministers, without the intervention of the House of Commons. While deprecating this novel

^j Fort. Rev. v. 24, n.s. p. 265; Todd, Parl. Govt. v. 2, p. 414, new ed. p. 512.

^k Hans. Deb. v. 195, p. 739.
^l *Ib.* v. 7, p. 430.

Resigna-
tion of
ministry.

departure from ancient constitutional usage, he considers these recent cases as indicating the course which in all probability will be generally followed hereafter, upon similar occasions; subject, of course, to the discretion of ministers, who must retain a liberty of choice in a matter of such grave importance, which involves serious consequences to themselves, to their party, and to the nation.^m

The effect of adverse votes in Parliament upon the fate of a ministry, and the constitutional practice which regulates the granting or withholding by the governor of an appeal by a defeated administration to the constituencies, will be considered in a later part of this treatise.

^m Int. Rev. v. 2, p. 374.

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CHAPTER III.

HISTORICAL ACCOUNT OF THE INTRODUCTION OF PARLIAMENTARY GOVERNMENT INTO THE COLONIES OF GREAT BRITAIN.

HAVING investigated the general principles of parliamentary government, in their application to colonial rule, we will proceed to inquire into the particular circumstances which gave rise to the establishment of that system in the more important colonies of the empire.

Origin of colonial parliamentary government.

The first colony of Great Britain wherein this measure of colonial administrative reform was introduced was Canada.

The following is the chronological order in which constitutional government was established in the older provinces of Canada :^a

Nova Scotia	1758
Prince Edward Island	1773
New Brunswick	1784
Upper Canada }	
Lower Canada }	1791

Responsible government was introduced into Canada in 1841, and in the Maritime Provinces in 1848.^b

Both in Lower and in Upper Canada—which were then separate provinces, with distinct governments—political grievances had for several years existed, and begun to assume a threatening aspect, tending to the overthrow of the authority of the British Crown, and

^a McCord's Handbook of Canadian Dates, pp. 10-12. Montreal, 1888.

^b See *post*, p. 80.

Political
griev-
ances in
Canada.

the assertion of independence under republican institutions. These grievances were mainly attributable to the lack of a spirit of harmony and co-operation between the legislative and executive authorities. Similar complaints found expression in the maritime colonies of British America; although the orderly and loyal spirit prevailing therein kept back the spirit of disaffection, which had manifested itself in overt acts of rebellion in both Canadian provinces.^c

Lord Dur-
ham's re-
port.

The insurrection in Canada was, however, promptly suppressed by the strong arm of military power; aided, at least in the upper province, by the awakened loyalty of the great bulk of the population. At this juncture, the Earl of Durham was deputed to proceed to Canada, as governor-general and lord high commissioner, to investigate the affairs of British North America. In 1839, the year after his appointment, Lord Durham presented to the Queen an elaborate report on the result of his inquiries. In this report, his lordship recommended, as a panacea for all existing political complaints, the introduction into the several British North American colonies of the principle of local self-government; thereby rendering our colonial polity, so far as was consistent with the maintenance of British connection, and of imperial supremacy, 'an image and transcript of the British constitution.'^d

Lord J.
Russell's
despatches.

Mr. Poulett Thomson (afterwards Lord Sydenham) was sent to Canada, in the autumn of 1839, as governor-general; and he was instructed to give effect to the

^c For instructions to early governors in Canada and provinces see Can. Sess. Pap. 1883, No. 70.

^d This phrase was first employed by Lieutenant-Governor Simcoe, in his speech from the throne, at the close of the first session of the first provincial parliament of Upper Canada, in 1792. It expressed the

intentions of the imperial government in reference to the establishment of representative institutions in that province; although these intentions did not apparently contemplate, at that early period, the introduction of 'responsible government.' Com. Pap. 1839, v. 33, p. 166.

principles set forth in Lord Durham's report. Lord John Russell (then colonial secretary) officially notified Mr. Thomson of the system under which he was to administer the government, in a despatch dated Sept. 7, 1839, which embodied her Majesty's instructions upon his assumption of the government of British North America; and subsequently in two despatches dated Oct. 14 and 16, 1839. These despatches deprecated any attempt to apply the principle of ministerial responsibility to a provincial assembly, to acts of the governor which were performed by him in obedience to the royal instructions, or to questions of an imperial nature, as being at variance with the allegiance due to the British Crown. But the application of this principle to questions of local concern was approved; and directions were given to change the tenure of office of the heads of public departments in the province, so as to admit of such offices being held by executive councillors who should possess the confidence of the assembly, and of the removal of such persons from office 'as often as any sufficient motives of public policy might suggest the expediency' thereof. Lord Sydenham took an early opportunity of giving effect to these instructions, by publicly announcing that hereafter the government of Canada should be conducted in harmony with the well-understood wishes of the people, and that the attempt to govern by a minority would no longer be resorted to; a declaration which was received with satisfaction, by all moderate men, throughout the country.^e

Grant of responsible government to Canada.

In June 1841, soon after the opening of the first

^e Scrope, *Life of Lord Sydenham*, 2nd ed. pp. 257-268; *Canada Leg. Assem. Jour.* 1841, p. 390 and app. B. B. It is, nevertheless, undeniable that Lord Sydenham did not favour the full and unreserved ac-

ceptance of the system of responsible government, as it now prevails, and that his own views of the subject underwent considerable modification before the close of his career. *Dent's Canada*, v. 1, p. 300.

session of the parliament of the United Provinces of Lower and Upper Canada, the attorney-general (Mr. Draper), in reply to a demand for explicit information on the subject, assured the assembly that the provincial administration would henceforth be conducted upon the principle popularly known as 'responsible government.' But a verbal statement upon a matter of such vital importance was deemed by the Opposition as being insufficient and inconclusive; the more so, as it was notorious that leading members of the new cabinet had previously expressed themselves unfavourably in regard to this novel method of administration.^f

Canadian
resolu-
tions on
responsi-
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Accordingly, on Sept. 3, 1841, resolutions were submitted to the legislative assembly of Canada by Mr. Secretary Harrison (in amendment to a series substantially similar proposed by Mr. Robert Baldwin), which were unanimously agreed to, and which constitute, in fact, articles of agreement, upon the momentous question of responsible government, between the executive authority of the Crown and the Canadian people.

Resolu-
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It was resolved, (1) that 'the head of the executive government of the province being, within the limits of his government, the representative of the sovereign, is responsible to the imperial authority alone; but that, nevertheless, the management of our local affairs can only be conducted by him, by and with the assistance, counsel, and information of subordinate officers in the province.' (2) 'That in order to preserve, between the different branches of the provincial parliament, that harmony which is essential to the peace, welfare, and good government of the province, the chief advisers of the representative of the sovereign, constituting a provincial administration under him, ought to be men possessed of the confidence of the representatives of the

^f See Dent's Canada Since the Union, v. 1, ch. vi.

people; thus affording a guarantee that the well-understood wishes and interests of the people, which our Gracious Sovereign has declared shall be the rule of the provincial government, will, on all occasions, be faithfully represented and advocated.' (3) 'That the people of this province have, moreover, a right to expect from such provincial administration the exertion of their best endeavours that the imperial authority, within its constitutional limits, shall be exercised in the manner most consistent with their well-understood wishes and interests.'

Canadian
resolutions
on
responsible
government.

A further resolution was proposed, by Mr. Baldwin, to assert the constitutional right of the assembly to hold the provincial administration responsible for using their best exertions to procure, from the imperial authorities, that their rightful action, in matters affecting Canadian interests, should be exercised with a similar regard to the wishes and interests of the Canadian people. But this resolution, being presumably opposed to the principle of non-interference, by colonial ministers, in matters of imperial concern,—as maintained in Lord John Russell's despatch of October 14, 1839,—was, after debate, unanimously rejected.

Lord Sydenham died, unexpectedly, from injury sustained by a fall from his horse, a few days after the passing of these memorable resolutions. Sir Charles Bagot and Sir Charles Metcalfe, who severally succeeded him as governors of Canada in 1842 and in 1844, emphatically declared their acceptance of responsible government, as embodied in the foregoing resolutions. But, during their term of office, the system itself was imperfectly understood, and mistakes were made, on all sides, in the application of this hitherto untried experiment in colonial government to the practical administration of local affairs.^g

^g Grey, Colonial Policy, v. 1, p. 27. Dent's Canada, v. 1, cc. ix., xi., 205. Adderley, Colonial Policy, p. xiv. Mackenzie, Life of Hon. Geo.

Lord
Elgin's
adminis-
tration.

After a brief interval, during which Lord Cathcart (a military officer) was appointed governor-general, in view of the threatening aspect of our relations with the United States, the imperial government were impressed with the necessity for entrusting the management of affairs in Canada to a person who should possess an intimate knowledge of the principles and practice of the British constitution, some experience of the House of Commons, and a familiarity with the political questions of the day. Such an one was happily found in Lord Elgin, who was accordingly selected by the government of which Lord John Russell was premier, and Earl Grey the colonial secretary.

Previous to his departure for Canada, in January, 1847, Earl Grey carefully instructed the new governor-general as to the line of conduct he should pursue, and the means he should adopt, in order to bring into full and beneficial operation, in British North America, the novel machinery of constitutional government.

In Earl Grey's 'History of the Colonial Policy of Great Britain,' during Lord John Russell's ministry, we are informed of the general tenor of the instructions given to Lord Elgin, and of the successful result of his policy and conduct.^h *

Lord
Elgin on
responsi-
ble go-
vernment.

Lord Elgin's private letters to Earl Grey (written from Canada, and posthumously published) afford us some interesting details and valuable suggestions as to his methods of administration. He says therein: 'I give to my ministers all constitutional support, frankly and without reserve, and the benefit of the best advice that I can afford them in their difficulties. In return for this, I expect that they will, as far as possible, carry out my views for the maintenance of the connection

Brown, *Introd. chapter*. Toronto, 1882. See also *Fennings Taylor's Are Legislatures Parliaments?* c. 6.

^h See Grey, *Colonial Policy*, v. i. pp. 206-234. *Adderley*, p. 31.

with Great Britain, and the advancement of the interests of the province.' 'But,' he adds, 'I have never concealed from them that I intend to do nothing which may prevent me from working cordially with their opponents, if they are forced upon me;' showing my 'confidence in the loyalty of all the influential parties with which I have to deal,' and being devoid of 'personal antipathies.' 'A governor-general, by acting on these views, with tact and firmness, may hope to establish a moral influence in the province, which will go far to compensate for the loss of power consequent on the surrender of patronage to an executive responsible to the local parliament.' But 'incessant watchfulness and some dexterity are requisite to prevent him from falling, on the one side, into the *néant* of mock sovereignty, or on the other into the dirt and confusion of local factions.'¹

Lord Elgin on responsible government.

To the question, 'whether the theory of the responsibility of provincial ministers to the provincial parliament, and of the consequent duty of the governor to remain absolutely neutral in the strife of political parties, had not a necessary tendency to degrade his office into that of a mere *roi fainéant*?' Lord Elgin gave an unqualified negative. 'I have tried,' he said, 'both systems. In Jamaica, there was no responsible government; but I had not half the power I have here, with my constitutional and changing cabinet.' Even on the viceregal throne of India, he missed, at first, something of the authority and influence which he had exercised, as constitutional governor, in Canada. This influence, however, was 'wholly moral,—an influence of suasion, sympathy, and moderation, which softens the temper while it elevates the aims of local politics.'¹

¹ Walrond's Letters of Lord Elgin, pp. 125, 126. Prince Albert's Letter, in Martin's Pr. Consort, v.

² Walrond's Letters of Lord Elgin, p. 260.

Responsible government in the maritime provinces and other colonies.

* The success of responsible government in Canada, under the presidency of Lord Elgin, led to its gradual introduction into the maritime colonies of British North America, and subsequently into the several colonies of Australia wherein representative institutions had been established; and into New Zealand, Tasmania, and the Cape of Good Hope.

* Ultimately, upon the confederation of the provinces of Upper and Lower Canada, Nova Scotia, and New Brunswick, into one dominion, under the Crown of Great Britain and Ireland, in 1867, it was provided in the imperial Act of Union that the constitution of the new Dominion should be 'similar in principle to that of the United Kingdom.'^k

* Responsible government was introduced into Nova Scotia and into New Brunswick in 1848, whilst Earl Grey, an experienced statesman, and an able writer upon constitutional government, held the seals of the colonial office.¹

At the outset, a difficulty arose in Nova Scotia, in regard to the application of the new tenure of appointments to office, which serves to explain the extent to which the imperial government was prepared to concede the principle of non-interference in matters of local concern, and at the same time to show the legitimate extent of the powers of a governor.

In a despatch to Governor Harvey, of Nova Scotia, dated March 31, 1847, Earl Grey adverted to certain necessary qualifications and restrictions in the application of parliamentary institutions to the colonies. He

^k British North America Act, 1867, 31 Vict. c. 3. preamble.

¹ See the correspondence between the governors of the British North American provinces and the secretary of state, relative to the introduction of responsible govern-

ment therein. Com. Pap. 1847-48, v. 42, pp. 51-88. For papers descriptive of the original constitutions granted by the Crown to the maritime provinces of British North America, see Can. Sess. Pap. 1883, No. 70.

dwelt with much emphasis upon the importance of 'abstaining from going further than can be avoided, without giving up the principle of executive responsibility, in making the tenure of offices in the public service dependent upon the result of party contests'; and he advised that, with the exception of a very few prominent and necessarily political offices, the remaining appointments to public employ should be held independently of party, and be virtually irremovable, except for obvious misconduct or unfitness. The colonial secretary likewise pointed out the necessity, on the part of the people of Nova Scotia, of refraining to effect any reform in their institutions, however just or desirable, at the cost of injustice to individuals. And therefore, that, in replacing, by political heads of departments, men who had served faithfully under a non-political tenure, it would be most unfair not to compensate those who had been removed from office, on this account, by insuring them a provision that would make up for the loss of official income.^m

Responsible government in Nova Scotia.

Nevertheless, the first administration formed in Nova Scotia, under responsible government, ignored the wise and considerate counsels of Earl Grey in this particular, and insisted upon the removal of an old public officer, who filled the position of colonial treasurer (and whose office it was proposed to divide into two political departments,—that of a receiver-general and of a financial secretary),—without making any compensation to him for his loss of office. The governor demurred to this proceeding; but his objections were overruled. He then, at the suggestion of Earl Grey, directed that the whole correspondence on the subject should be submitted to the colonial legislature. This was done; but the legislative council and the house

^m Com. Pap. 1847-48, v. 42, p. 77.

Difficulty
in Nova
Scotia.

of assembly upheld the ministry, and passed an Act for the division of the office, as above-mentioned, without making any provision for the existing incumbent, who was accordingly left without redress. To this Act the imperial government gave a reluctant assent.

The non-intervention of the imperial government to prevent such an act of personal injustice was regarded by many inhabitants of Nova Scotia with alarm; and they petitioned the Imperial Parliament, representing the injury sustained by the province in the loss of the supervision of imperial authority as a safeguard against oppression or abuse of power by the local government. This petition gave rise to a long debate in the House of Lords, on March 26, 1849, wherein leading statesmen of both parties expressed themselves freely upon the question, but without any motion being proposed thereon.

Earl Grey defended the course taken by himself and by Governor Harvey upon this occasion. He deprecated the attempt to renew, in the Imperial Parliament, colonial political contests. Such a proceeding was both novel and inexpedient. He showed that, as a general rule, the advice given to the local authorities upon the introduction of responsible government had been favourably received, and frankly adopted; that, in the particular instance, there were circumstances (which he explained) that rendered the action of the local government less objectionable than would at first appear; and that for the governor to have insisted upon compensation to the ex-treasurer would have led to the resignation of his ministers, would have caused 'the affairs of the colony to be thrown into confusion,' and 'would have been an overstraining of the powers of the Crown.' On the other hand, the secretary of state felt 'bound to assert that the power and influence

of the Crown are by no means to be ineffective or unimportant.' Doubtless, that power 'should be used, not resolutely to resist and oppose, but judiciously to check and guide, the public opinion of the colonies into proper channels.'

Earl
Grey's
instruc-
tions to
Sir J.
Harvey.

His advice to Sir John Harvey had been: 'Act strictly upon the principle of not identifying yourself with any one party; but, instead of this, making yourself both a mediator and a moderator between the influential of all parties. In giving, therefore, all fair and proper support to your council for the time being, you will carefully avoid any acts which can possibly be supposed to imply the slightest personal objection to their opponents, and also refuse to assent to any measures which may be proposed to you by your council which may appear to you to involve an improper exercise of the authority of the Crown for party rather than for public objects.'

'In exercising, however, this power of refusing to sanction measures which may be submitted to you by your council, you must recollect that this power of opposing a check upon extreme measures, proposed by the party for the time in the government, depends entirely for its efficacy upon its being used sparingly, and with the greatest possible discretion. A refusal to accept advice tendered to you by your council is a legitimate ground for its members to tender to you their resignation; a course they would doubtless adopt, should they feel that the subject on which a difference has arisen between you and themselves was one upon which public opinion would be in their favour. Should it prove to be so, concession to their views must sooner or later become inevitable; since it cannot be too distinctly acknowledged that it is neither possible nor desirable to carry on the government of any of the

British provinces in North America in opposition to the opinion of the inhabitants.'"^a

Responsible government in Australia.

Particulars in regard to the events which led to the introduction of responsible government into the Australian colonies, and of the circumstances attending the same, will be found in the sessional papers of the House of Commons, for the years 1849 to 1856 inclusive.

General authority to effect the changes in the constitutions of the several Australian colonies necessary for the establishment of local self-government therein, was conferred by the Imperial Act 13 and 14 Vict. c. 59. Under this statute, or under the subsequent Acts of the 18 and 19 Vict. cc. 54 and 55, parliamentary institutions were introduced into Australasia at the under-mentioned periods; viz., into Tasmania and Victoria, in 1855; into New South Wales and South Australia, in 1856; into New Zealand, by special enactment, in 1856; into Queensland, upon its being set apart as a separate colony, in 1860; and into Western Australia in March, 1875.

In Western Australia.

In the legislative council of Western Australia a resolution was carried on April 18, 1883, for an address asking the terms and conditions upon which responsible government would be granted to the colony. In reply, the colonial secretary stated that he was not in possession of all the information that would enable him to say what arrangements would be necessary in the event of it seeming desirable to introduce responsible government into the colony; at the same time he pointed out what appeared to be the special difficulties in the way of its accomplishment, that would require careful consideration before being adopted, and concluded by desiring a full and exhaustive report from the governor in the matter, accompanied by a return showing the popula-

^a Com. Pap. 1847-48, v. 42, p. 56; Hans. D. v. 103, pp. 1262-1289.

tion, land sold and leased, and receipts and expenditure in each district of the colony.

Accordingly on April 9, 1884, the governor, Sir F. N. Broome, made a report on the condition of the colony, and recommended that responsible government should not be refused, provided that the electorate made it clear in the elections to be held in 1885, that the colony desired the change; but in the event of responsible government being granted, the colony ought to be divided, and the northerly portion be erected into a Crown colony. In reply, the colonial secretary stated that, should the electors at the general election declare themselves very decidedly in favour of a change of constitution, her Majesty's government would not refuse to examine the details of the arrangement which the introduction of responsible government would render necessary. No action, however, appears to have been taken at the elections on the question.

On July 6, 1887, the legislative council passed two resolutions: (1) for the adoption of responsible government, and (2) that Western Australia should remain one and undivided under the new constitution. In forwarding the resolutions to the colonial secretary the governor, in a despatch dated July 12, 1887, stated that, 'having carefully considered the whole matter, I strongly support both the first and the second of the resolutions,' and gave his reasons why he had changed his opinion in respect to the suggested division of the colony in his despatch of three years previous, but added that it was but a matter of time when the colony would be separated into two or more distinct colonies. The answer from the colonial secretary was to the effect that her Majesty's government did not feel it to be their duty to object to the principle of the propositions, subject to the important reservation as to the government of the northern districts.

Responsible
government in
Western
Australia.

Respon-
sible
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ment in
Western
Australia.

At this stage of the proceedings a petition against responsible government, signed by ninety colonists of good standing, having a substantial stake in the colony, was addressed to the colonial secretary. The governor, in transmitting the paper, remarked that he did not think that it should 'over-ride the expressed wish of the colonial legislature, supported by the governor, and already agreed to, with certain reservations, by her Majesty's government.'

In May, 1888, the draft of a Constitution Bill was passed by the legislative council, and forwarded for the sanction of the imperial government. It provided for an elective upper house of fifteen members, and a lower house to consist of thirty members. The colonial secretary by despatch, dated August 31, 1888, returned the Bill recast; amongst other alterations making legislative councillors by appointment instead of elective. On April 26, 1889, the Bill finally passed the legislative council, with some minor amendments, acceptable to the colonial secretary. The legislative council to be nominated, but after six years to become elective, or when the colony has a population of 60,000, whichever happens first. Though the Bill was introduced into the Imperial Parliament the same year, there was such strong opposition to it on both sides of the house—chiefly as to the wisdom of handing over such a large area of land to responsible ministers—that it was withdrawn on August 26, much to the disappointment of the government of Western Australia. In order that the Bill might receive every possible assistance through the Imperial Parliament in the coming session the legislative council sent a special delegation, with the sanction of the colonial secretary, consisting of the governor, Sir F. N. Broome, whose term of office was about to expire, Sir T. C. Campbell, and S. H. Parkes, Esq., to proceed 'to endeavour by every means in their

power to promote the passing of the Bill as brought before the Imperial Parliament last session.' On July 25, 1890, the measure became law by Imperial Act 53 and 54 Vict. c. 26, entitled 'An Act to enable Her Majesty to assent to a Bill for conferring a Constitution on Western Australia.'^o

Responsible government in Western Australia.

In regard to New Zealand; after much previous correspondence on the subject, so early as in 1852, a representative constitution was granted, by the Imperial Act 15 and 16 Vict. c. 72.^p But various causes contributed to delay the accomplishment of the beneficent intentions of the mother country towards this colony; and it was not until September, 1855, that the governor, Colonel Gore Browne, communicated to the general assembly the desire of her Majesty's government that the colony should enjoy 'the fullest measure of self-government which is consistent with its allegiance to the British Crown,' and that, accordingly, he would, as speedily as possible, 'carry out in its integrity the principle of ministerial responsibility; being convinced that any other arrangements would be ineffective to preserve that harmony between the legislative and the executive branches of the government, which is so essential to the successful conduct of public affairs.' It was stipulated, at first, that questions affecting the Maoris should be exempted from ministerial control, but this proved impracticable; the point was virtually surrendered by the imperial government

In New Zealand.

^o Correspondence on introduction of responsible government in Western Australia, Com. Pap. 1889, v. 55, pp. 363, 503; *ib.* 1890, v. 49, p. 293.

^p For the origin and history of this constitution, see Sir C. B. Adderley (Lord Norton), Colonial Policy, pp. 133-162. It has been since amended by imperial enactments, enabling the colonial parlia-

ment to effect changes in the constitution within certain limits. See Imperial Acts 20 & 21 Vict. c. 53; 25 & 26 Vict. c. 48; 26 & 27 Vict. c. 23, and see 31 & 32 Vict. c. 57. See also despatches relative to the granting of representative institutions to New Zealand between the imperial and colonial governments in 1845 to 1853. N. Z. Parl. Pap. 1883, A. 3 a.

Responsible
government
in New
Zealand.

before the close of the first session under responsible government, and ere long it was entirely abandoned. 'This ultimately led to the introduction of Maori representatives into both chambers of the New Zealand parliament, where they have been found very useful members.'¹

A new parliament was first convened; and in April, 1856, the governor commenced negotiations with a gentleman who was in the confidence of a majority in the assembly on the formation of a responsible ministry.

At the outset, the governor declared his determination to maintain 'a perfect neutrality in all party questions.' He then addressed a minute, to the gentleman above referred to, with an explanatory memorandum, defining his own views as to the relation which should subsist between himself and his responsible advisers.

This minute states: '(1.) In all matters under the control of the assembly, the governor should be guided by the advice of gentlemen responsible to that body, whether it is or is not in accordance with his own opinion on the subject in question.' But, in explanation of this general proposition, it is added, that 'the governor of course reserves to himself the same constitutional rights, in relation to his ministers, as are in England practically exercised by the sovereign'; and that he does not include in the category of subjects under the control of the assembly any matters affecting the Queen's prerogative, and imperial interests in general. (2.) Upon all such matters 'the governor

¹ Com. Pap. 1860, v. 46, p. 169, Rusden, Hist. of N. Zealand, v. 1, ch. ix. v. 3, p. 462. In 1867 (also 1887) an Act was passed to authorise the representation of the Maoris in the

assembly by four members; in 1872 two Maoris were appointed to the executive and legislative council. Bowen, Sir G., Thirty Years' Col. Govt. v. 1, p. 426.

will be happy to receive the advice of his executive council; but, when he differs from them in opinion, he will (if they desire it) submit their views to the consideration of her Majesty's secretary of state; adhering to his own until an answer is received.'

Responsible government in New Zealand.

Other questions, of purely local concern, are discussed in this minute; which concludes by stating that, 'in approving appointments to vacant offices, the governor will require to be assured that the gentlemen recommended are fit and eligible for their respective situations.'

These terms and conditions were severally accepted and agreed to by the incoming ministers, with the understanding that they were open to alteration by the colonial secretary.^r

In due course, the secretary of state for the colonies intimated to Governor Browne that, 'after the best consideration which they could give to the subject, her Majesty's government approve of the principles' upon which he proposed to administer the government of New Zealand, as the same were defined in the minute and memorandum aforesaid.^s

Queensland, which previously formed part of the province of New South Wales, was set apart as a separate colony, by an order in council, issued in 1859, under the authority of the Imperial Act 18 and 19 Vict. c. 54.

In Queensland.

Sir George F. Bowen was chosen as the first governor of the new colony, with instructions to inaugurate representative institutions therein in combination with local self-government.

He met with an enthusiastic reception in the colony, and in reporting to the secretary of state (the Duke of Newcastle) his proceedings, Sir G. F. Bowen, in a des-

^r Com. Pap. 1860, v. 46, pp. 228, 229.

^s *Ib.* p. 481.

Sir G. F.
Bowen
on a
governor's
functions.

patch dated April 7, 1860, remarks as follows: 'There cannot, in my opinion, be a greater mistake than the view which some public writers in England appear to hold; namely, that the governor of a colony, under the system of responsible government, should be, in a certain sense, a *roi fainéant*. So far as my observation extends, nothing can be more opposed than this theory to the wishes of the Anglo-Australians themselves. The governor of each of the colonies in this group is expected not only to act as the head of society; to encourage literature, science, and art; to keep alive, by personal visits to every district under his jurisdiction, the feelings of loyalty to the Queen, and of attachment to the mother country, and so to cherish what may be termed the imperial sentiment: but he is also expected, as head of the administration, to maintain, with the assistance of his council, a vigilant control and supervision over every department of the public service. In short, he is in a position in which he can exercise an influence over the whole course of affairs, exactly proportionate to the strength of his character, the activity of his mind and body, the capacity of his understanding and the extent of his knowledge.'

In replies to addresses presented to him when upon official tours through Queensland, Sir G. F. Bowen gave expression to his idea of the duties and responsibilities of a governor. His views met with general acceptance, and the people everywhere appeared to vie with each other in testifying their loyalty to the Queen, their cordial respect for her representative, and their attachment to the mother country."

In further explanation of his sense of the obligations entailed upon him as a constitutional governor, Sir

^t Com. Pap. 1861, v. 40, p. 607. L. 1889.

See also Sir G. F. Bowen's *Thirty Years of Colonial Life*, 2 vols. 8vo.

^u *Ib.* pp. 607, 613.

G. F. Bowen mentions in a subsequent despatch, dated August 11, 1860, that the impression had gone abroad that 'certain very unfit persons' had been raised to the bench in Australia 'for political reasons, by the various local ministries which have succeeded each other so rapidly in this quarter of the world.' Whilst unwilling to reflect in the slightest degree on other governors, who, he was aware, had had to contend with great difficulties, Sir G. F. Bowen adds: 'I, for one, cannot bring myself to assent to the doctrine (if it be anywhere held) that the establishment of parliamentary government absolves the representative of the Crown from all responsibility as to the appointments to public offices. It is his undoubted right and duty to disallow ill-advised acts of the colonial legislature, and I venture to think that he is *a fortiori* bound to refuse his sanction to the employment in the Queen's colonial service of individuals of dubious character, and especially to the nomination of such persons to offices like those of judges and magistrates who hold her Majesty's commission. In accordance with this view, I carefully examined, name by name, with my executive council, the new commission of the peace, admitting only those gentlemen whose character, acquirements, and social position render them worthy of so honourable and important a trust. . . . My present ministers cordially concur with the principles which I have thus attempted to explain; and I am confident that I shall at all times be supported by the public opinion of this colony in acting on them firmly and consistently. It is my intention so to act, with the approval of her Majesty's government.'

Sir G. F.
Bowen
on a
governor's
functions.

In 1883, the government of New South Wales removed from the commission of the peace three magistrates who had signed an

† Com. Pap. 1861, v. 40, p. 630.

address to an Irish member of parliament, visiting the colony, which contained expressions of a seditious and disloyal character. This proceeding was cordially approved by the secretary of state for the colonies.^w

Sir G. F.
Bowen on
functions
of a
governor.

Commenting upon the constitutional question mooted in the despatch above cited,—as to the amount of influence to be exercised by the governor of a colony wherein local self-government has been established,—the secretary of state, in a despatch dated November 26, 1860, observes that the position defined by Sir G. F. Bowen ‘is one which may be occupied by a governor, with great propriety, and with the utmost advantage to the colony over which he presides; its rights and duties being at once sustained and limited by the necessity of finding support in an enlightened public opinion, and the services of ministers capable of carrying on the government of the colony with the concurrence of the legislature.’^x

In 1872, the governor of Queensland, by additional letters patent, under the great seal, was appointed governor of all islands within sixty miles of the coast, and was empowered to annex these islands to the colony of Queensland (notwithstanding that they had previously been included within the commission of the governor of New South Wales), provided that the legislative council and assembly thereof should desire such annexation.^y On August 16, 1872, the legislative council requested the governor to exercise the powers above-mentioned, under the letters patent. On October 10, 1878, additional letters patent were issued for a similar purpose.^z

By royal charter Natal was erected into a separate colony in the year 1856, presided over by a governor,

^w Com. Pap. 1883, v. 47, p. 211.

^x *Ib.* 1861, v. 40, p. 671.

^y Queensland, Leg. Coun. Jour. 1872, p. 833.

^z *Ib.* 1879, Sess. i. p. 39. See also *post*, p. 221, for Permissive Act passed by N. Zealand to annex islands.

assisted by an official executive council, and a partly nominated and partly elective legislative council. By a supplementary charter issued in 1869, two of the elective members of the legislative council were appointed to the executive council.

Government of Natal.

From time to time measures were introduced in the legislative council to prevail upon the imperial government to grant a responsible system to the colony, though a difference of opinion existed amongst the colonists as to the wisdom of the proposed change, e.g.:—In 1870 a Bill was introduced revoking the charter and providing for an elective chamber. In 1874 a Bill was passed by a majority of the elective members of the legislature (the official members not voting), providing for the establishment of responsible government, and the erection of two houses. In 1875 a law was passed adding to the chamber eight non-official nominee members, and requiring that laws imposing taxes should be carried by not less than a two-thirds vote. The operation of this Act being limited to five years, on its expiration in September 1880, the constitution reverted to what had previously been in vogue.

On the revival of the question in 1881 Lord Kimberley, in February of the following year, authorised an appeal to be made to the country on the issue. At the meeting of the new legislature, in June 1882, it was submitted to the deliberate judgment of that body by Governor Bulwer. The legislative council, however, passed resolutions declining to accept the burden of responsibility offered in Lord Kimberley's despatch, but suggested improvements in the mode of administering the government of the colony. A Bill was accordingly passed for the reform of the legislative council, which was sanctioned by the imperial government in 1883. Under it the legislative council consists of

Govern-
ment in
Natal.

thirty members (increased to thirty-one in 1889) of whom seven are nominees of the Crown.^a

In October 1888 a select committee of the legislative council reported 'on the political constitution of Natal,' setting forth the desirability of a change in the system of government, and concluded their report by formulating a series of questions to be submitted to her Majesty's government for information regarding the occupation of the colony by imperial troops for purposes of defence; the control of native affairs; the annexation of Zululand, &c., in the event of the colony acquiring responsible government, or otherwise. This report passed the council by a majority of three, but a resolution was carried requesting that the governor, in forwarding the report to the colonial secretary, state 'that the council had not expressed any opinion of approval or otherwise on the matters dealt with in the report.'^b

In reply the colonial secretary pointed out the difficulty in answering the questions submitted in the absence of any expression of opinion on the part of the legislative council, also that the large and disproportionate increase of native population, as compared with that of the white, led persons outside of the colony to the opinion that her Majesty's government would not be justified in proposing the introduction of responsible government, 'especially in the absence of any decided preponderance of public opinion of the colony in favour of the step.'^c

Further correspondence between the governments resulted in the question being submitted to the people, at a general election held in the colony in October 1890, for a decided declaration in favour or otherwise of the

^a C. O. List, 1892, p. 160.

Pap. 1891, c. 6487, p. 1.

^b Proposals to establish responsible government in Natal. Com.

^c *Ib.* p. 22.

proposed change. Of the twenty-four members returned, fourteen were pledged to vote for, and ten against, establishment of responsible government. On October 3, 1890, a select committee of the legislative council was appointed to draft an amended constitution. The Bill as brought up by the committee provided for two chambers, but was subsequently amended and a single chamber substituted. Strong protests to the new constitution from colonists were forwarded to the governor for transmission to the colonial secretary.^d In reply the colonial secretary in a despatch dated May 28, 1891, stated that, 'subject to certain safeguards and conditions already known in outline to the colonists of Natal, the time has come when the system known as responsible government may be established in the colony; but the Bill as passed will require modification in some respects before I can advise the Queen to assent to it.'^e In conclusion the colonial secretary added: 'If the legislative council should feel any doubts as to re-enacting the Bill, so as to provide for the points to which I have referred, and should desire further explanations, it may be convenient that representatives of the council should visit this country and confer with her Majesty's government.' From this it may be expected that responsible government in Natal will be an accomplished fact in the near future.

Government in Natal.

By letters patent dated May 23, 1850, representative institutions were authorised to be established in the Cape of Good Hope; and three years later the new constitution was introduced. It consists of a governor, holding his commission from the Crown; a legislative council and a house of assembly, both elected by the people.

In Cape of Good Hope.

Formerly the legislative council was composed of

^d Com. Pap. 1891, c. 6487, pp. 58-66, 68, 69, 71.

^e *Ib.* p. 71.

Respon-
sible
govern-
ment in
Cape
Colony.

eleven members for the western and ten members for the eastern province, chosen by the whole body of electors. But in 1874 the country was divided into seven electoral provinces, each of which returns three members to the upper chamber. And another member added to represent the annexed province of Griqualand by Act No. 39 of 1877.^f This change went into operation at the dissolution of parliament, on September 12, 1878. The council is elected for seven years.

The house of assembly consists of seventy-four members, elected for five years. The governor may dissolve both houses, 'but the "council" may not be dissolved unless the "assembly" be simultaneously dissolved.'^g

The introduction of 'responsible government' into this colony was first suggested by the imperial government in 1869, but the proposal was objected to by the governor (Sir P. E. Wodehouse), and was regarded with disfavour at the Cape. But no other plan appearing to promise a successful administration of government, her Majesty's secretary of state for the colonies again urged upon the colony the adoption of parliamentary institutions. Accordingly, in 1871, a Bill to amend the constitution by incorporating therein the system of ministerial responsibility was submitted to the consideration of the local parliament by the governor. It passed the house of assembly, but was rejected by the upper house. The Bill was again introduced in the following year, when it was agreed to by both chambers. It was necessarily reserved for the signification of the Queen's pleasure; but the royal assent was announced by proclamation on August 28, 1872.^h

^f C. O. List, 1891, p. 95.

don, 1887.

^g Brydges-Todd, Handy Guide to Cape of Good Hope, p. 8. Lon-

^h Com. Pap. 1870, v. 49, p. 369; *Ib.* 1873, v. 49, p. 267, 319.

The reasons which actuated the home government, in pressing upon the Cape colony the adoption of the system of responsible government, are ably stated by Lord Blachford, who (as Sir Frederic Rogers) was permanent under-secretary of state for the colonies when this question was first mooted.ⁱ But an article by Earl Grey, in the 'Nineteenth Century' (vol. 8, p. 933), advocated the withdrawal of 'responsible government' from South Africa as essential to prevent the continuance of unjust and costly wars with the adjoining native tribes. On November 18, 1880, however, Earl Kimberley, in reply to a deputation from the Aborigines Protection Society, vindicated the conduct and policy of the government in relation to South Africa.^k

Responsible
government in
Cape
Colony.

Consequent upon this change in the constitution, a new commission was sent to the governor of Cape Colony with fresh instructions, similar to those furnished to other colonies possessing local self-government.

By these instructions the governor was enjoined, in the execution of the powers intrusted to him by his commission, in all cases to consult with his executive council, 'excepting only in cases which may be of such a nature that, in your judgment, our service would sustain material prejudice by consulting our council thereupon, or when the matters to be decided shall be too unimportant to require their advice, or too urgent to admit of their advice being given by the time within which it may be necessary for you to act in respect of any such matters: Provided that, in all such urgent cases, you do subsequently, and at the earliest practicable period, communicate to the said council the measures which you may so have adopted, with the reasons thereof. And we do authorise you, in your discretion, and if it shall in any case appear right, to act in the exercise of the power committed to you by our said commission in opposition to the advice which may in any such case be given to you by the members of our

ⁱ See Nineteenth Cent. v. 6, p. 271.

^k See The Colonies, 1880, Dec. 4, p. 828.

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government in
Cape
Colony.

said executive council: Provided, nevertheless, that in any such case you do fully report to us, by the first convenient opportunity, any such proceeding, with the grounds and reasons thereof.¹

* Power reserved to
the Crown.

These provisions in the revised instructions to the governor of the Cape of Good Hope, issued after the concession of parliamentary institutions to that colony, exhibit the reserved power expressly retained by the British government in order to prevent the grant of local self-government from tending, under any circumstances, to the degradation of the rights inherent in the Crown in the English political system; and as a constitutional barrier against the possible encroachment upon those rights by the usurpation of power on the part of a local administration.

Similar provisions to guard against the evils of democratic ascendancy, under the pretext of 'responsible government,' will be found in the commission and instructions issued to Sir James Fergusson, upon his appointment, in 1873, as governor of New Zealand;^m in the instructions issued in April, 1877, to the governor of South Australia, accompanying the permanent letters patent constituting the office of governor in that colony;ⁿ and likewise in the instructions issued to Sir Bartle Frere, upon his appointment in February, 1877, to succeed Sir Henry Barkley as governor of the Cape of Good Hope, in connection with the new letters patent for the permanent establishment of that office.^o

As the result proved, this constitutional restriction upon the undue assumption of power by a colonial ministry under responsible government was—so far at least as respects the Cape colony—a most necessary

¹ Com. Pap. 1873, v. 49, p. 338. 1877, No. 109.

^m New Zealand Assem. Pap. 1873, A. 6.

ⁿ South Australia Parl. Proc.

^o Cape of Good Hope Assem. Pap. 1878, A. 8.

act. It enabled the governor to uphold and maintain the rights of the Crown upon a grave political emergency, when those rights were assailed by the first ministry which was formed under the new constitution. In February, 1878, the governor of the Cape was compelled in vindication of his office to assert the lawful supremacy of the Crown by the dismissal of his ministers, at a time when they were in full possession of the confidence of the local parliament, and able to command a majority in the house of assembly. Further particulars of this case will be found in another part of this volume. It may suffice to add, in this place, that Sir Bartle Frere's conduct upon this trying occasion was warmly approved by her Majesty's government, and that the new administration which he formed, after dismissing the Molteno ministry, was sustained (without a previous dissolution of parliament) by a decisive vote in the local assembly.^p

Dismissal
of his min-
isters by
Govrenor
Frere.

In addition to his ordinary commission as governor of the colony, a further commission was granted to the governor of the Cape of Good Hope, appointing him to be her Majesty's high commissioner for the territories of South Africa adjacent to the said colony. This commission is issued for the purpose of enabling the governor to act in the name and on behalf of the Queen, and to represent her Crown and authority in respect of the native tribes in South Africa; and, further, to empower him to hold communication with the authorities of the two republics established in South Africa, and with the representative of any foreign power. In the exercise of this trust, the high commissioner is required to invite and obtain the co-operation of the foreign powers afore-said, towards the preservation of peace and safety in

Queen's
commis-
sioner for
South
Africa.

^p Despatches of colonial secretary (Sir M. Hicks-Beach) to Governor Frere, dated March 21 and July 25, 1878; Com. Pap. 1878, v. 56, p. 134; *Ib.* p. 629. And see the Nineteenth Cent. v. 4, p. 1069.

Queen's
commis-
sioner for
South
Africa.

South Africa, and the general welfare and advancement of its territories and peoples.^a

• By the terms of this commission the governor is required, in his capacity of Queen's high commissioner, to do whatever may be lawfully and discreetly done to prevent the recurrence of any irruption into the British possessions of the tribes inhabiting the territories aforesaid; and all persons in the said British possessions are commanded to aid and assist him to this end. In the performance of this duty the governor's functions are clearly defined in his separate commission; and they are not subject to the limitations imposed upon his authority in civil matters, lying entirely within the Cape colony, by responsible government as established at the Cape. On the occurrence of any difference of opinion between the governor and his ministers for the time being, as to the conduct of a war with the native tribes in South Africa, it is clear that the local administration, whilst affording to the governor the benefit of their advice and co-operation, should not hesitate to subordinate their opinions to his; it being obvious that the successful and speedy repression of any such outbreak 'concerns, either directly or indirectly, the interests of large numbers of her Majesty's subjects in South Africa, living altogether beyond the jurisdiction of any single colonial administration.'^r

It is not the duty of the ministry of this colony to advise the high commissioner. Their duty as ministers is to advise the governor of the colony. And the high commissioner has powers which he exercises as high commissioner, with which powers the government of this colony have no constitutional right to interfere.^s

^a See the commission in Cape Hicks-Beach) to Governor Frere, Assembly Votes, 1878, Annexures, March 21, 1878; Com. Pap. 1878, A. 8, No. 4; Com. Pap. 1881, v. 66, v. 56, p. 135.

p. 137.

^s Speech of the Treasurer-General in Cape Leg. Coun. June 26,

^r Colonial Secretary (Sir M.

The first ministry under 'responsible government' in the Cape colony took office in December, 1872. This change in the colonial administration had the immediate effect of substituting 'a single strong governing power . . . for the dual forces of the executive and legislature, which were before, as often as not, exerted in opposite directions.'^b And at the close of the session of 1873 the governor was able to declare that 'in no previous session does it appear that such harmonious action has prevailed between the executive and both branches of the legislature, nor has the business of legislation ever been carried on so satisfactorily and at the same time so expeditiously.'^c

Benefits of responsible government at the Cape.

This administration continued in office until February, 1878, when, as has been already intimated, its career of usefulness was brought to an abrupt close, under circumstances which will receive due consideration in a subsequent chapter.

After his retirement from office in August, 1880, Sir Bartle Frere bore testimony to the successful working of parliamentary institutions in the Cape colony, and to the eminent qualifications of the members in both houses for local self-government.^d

In his address on British South Africa, read before the Royal Colonial Institute on February 22, 1881, Sir Bartle Frere noted, as an element of weakness in the British colonial system, the belief that responsible government could not be perfectly carried out except by the operation of contending parties in the legislature, and he argued that party government was not essential to the success of representative institutions, or necessary to insure effective parliamentary control.

1888; Com. Pap. 1888, v. 74, p. 589. Correspondence on the subject of the expediency of separating the joint offices of governor of the Cape and high commissioner in South Africa, a question that was not prompted or approved by the Cape

government.

^b Com. Pap. 1874, v. 44, p. 145.

^c Votes and Proc. Cape Assem. 1873, p. 406.

^d His article on Colonial Policy in National Rev. v. 2, p. 1.

Fiji go-
vernment.

The Fiji group of islands became a Crown colony in 1874, and by the Act of Cession all lands passed to the Crown. Europeans and Americans had acquired considerable tracts of land from the native chiefs prior to annexation, and their claims were submitted to a Land Commission appointed to investigate their rights. Out of the number of cases submitted 517 were granted, 390 partly granted, 49 withdrawn, and 361 were disallowed. Amongst the latter were some German claimants to the amount of 140,000*l*. After considerable correspondence between the British and German governments, the matter was settled by a joint commission of both countries awarding the Germans 10,620*l*.^w The colony is presided over by a governor, assisted by an executive and legislative council. The latter consists of the chief justice, five heads of departments, six unofficial members appointed by the Crown for life, with the governor as president.^x

Western
Pacific
protec-
torate.

Closely allied to this colony is that of the Western Pacific Protectorate, formed by Order in Council in 1877, comprising the islands in the neighbourhood, but not within the limits of the Fiji group, Queensland, or New South Wales, nor under the protection of any foreign power. They are chiefly the Southern Soloman Islands, the New Hebrides, the Tongan or Friendly Islands, the Samoan or Navigator's Islands, and groups of Melanesia. The high commissioner of this protectorate is the governor of Fiji, and he presides over a court of deputy commissioners—of his own appointment—and judicial commissioners, the latter being the chief justices and judges of Fiji. This court has civil and criminal jurisdiction over the islands similar to that of the superior courts of England.^y

^w Australian Handbook by Gordon & Gotch, p. 497, 8vo. London, 1890.

^x Colonial Year Book, 1891, p.

^y *Ib.* 741.

After nearly five years' existence as a Crown colony, In Cyprus.
Cyprus was endowed in 1882 with representative institutions. The legislative council consists of twelve elected and six official members.^a

Malta received an enlargement of its constitution In Malta.
in 1887; the legislative council consists of six official and fourteen elected members, the executive council of seven official and three other members.^a

In closing our brief summary of the circumstances attending the introduction of parliamentary government into the principal colonies of Great Britain, it merely remains to add that, in some of the smaller and less progressive colonies, the attempt to establish local self-government has proved to be a failure. After a fruitless endeavour to work the system successfully, it was abandoned, and a simpler and more effective method of administration resorted to. This was notably the Abandonment of responsible government in the West Indies.
Jamaica.
case in regard to Jamaica, which for nearly two centuries had possessed a representative constitution, and had been latterly intrusted with a responsible government.^b In 1866, the local legislature, at the instance of Governor Eyre, unanimously agreed to abrogate all the existing machinery of legislation, and to accept in lieu thereof any form of government that might be approved by the Crown. Accordingly by an Imperial Act, passed in the same year, a new constitution was conferred upon the island, and subsequently declared, by Order in Council of May 19, 1884, to consist of a legislative council composed of four *ex-officio* members, five members appointed by the Crown, and nine elective members. Besides this chamber there is a privy council of eight members, appointed by the Crown, together with the colonial secretary and the attorney-general.^c

^a Com. Pap. 1882, c. 3211; *Ib.* 1883, c. 3661, 3772, and 3791.

^a Col. Year Book, 1891, p. 379.

^b See Lords' Pap. 1864, v. 13, p. 205.

^c Col. Year Book, 1891, p. 351.

Jamaica. The example of Jamaica, in surrendering her free institutions and becoming a Crown colony, was afterwards followed by other colonies in the West Indies.

British Honduras. British Honduras also in 1869 surrendered its representative government and became a Crown colony.^d

Leeward Islands. The Leeward Islands, by Imperial Act 34 & 35 Vic. c. 107, and reconstituted by Federal Act 15 of 1882, are composed of Antigua, Montserrat, Dominica, Virgin Islands, St. Kitts, Nevis, and Anguilla. They are governed by a legislative council of ten elective and ten nominated members. The larger islands have local legislatures, which have concurrent legislative powers with the federal.^e Subsequently, however, two or three islands of this group were converted into Crown colonies, which has materially diminished the usefulness and importance of the federal council of the Leeward Islands.^f In 1876 the separate governments of the islands of St. Vincent, Tobago, and Grenada (which, together with Barbados and St. Lucia, formerly constituted the Windward Islands), passed Acts to repeal their existing constitutions, and to vest the government in the Queen, leaving it to her Majesty to erect such a form of government therein as should be deemed most suitable for their future welfare.

Windward Islands. The Windward Islands, as now constituted by letters patent, March 17, 1885, are composed of Grenada, St. Lucia and St. Vincent, Bequia, and the Grenadines. Barbados is a separate colony, and Tobago is attached to Trinidad.^g There is no federal legislature. Grenada is governed by a legislative council of six official and seven unofficial members. St. Lucia has a legislative council of six official and six unofficial members, and

^d Com. Pap. 1881, v. 65, p. 1.

^e C. O. List, 1891, p. 153.

^f See paper by Mr. T. B. Berkeley, on Leeward Islands, in Proceedings of Royal Col. Inst. for 1880-81,

p. 31, which also contains an interesting discussion on working of federal system in these islands and other colonies.

^g Col. Year Book, 1891, p. 745.

an executive of four. St. Vincent has an executive council of four and a legislative council of eight members.^b

By a local Act passed in 1881, an important measure of financial control was introduced into the civil polity of Barbados. It provides for the establishment of an 'executive committee' to supersede the administrative boards, composed of members of the legislature, which were practically irresponsible, although they controlled the most of the public expenditure. The executive committee consists of the members of the executive council, one member of the legislative council, and four members of the assembly, selected by the governor, who presides as chairman. No money vote may be proposed to the legislature unless approved by the governor in executive committee. This committee prepares the annual estimates and controls the expenditure.¹

Barbados.

Nevertheless, 'representative institutions without responsible government are only adapted to an early stage of political society. The instinctive tendency of representatives is to grasp executive power in the name of the people. When this is wielded by ministries whom they can make or unmake, the passion is in some degree satisfied, and a state of equilibrium secured. When, on the contrary, the minister cannot be removed by any discontent of the assembly, we invariably find the latter restricting his sphere of action, descending to details in legislation which more properly belong to the discretion of the executive, and a state of chronic jealousy and antagonism between the assembly and the council produced, growing out of real or fancied encroachments, sometimes from the one side, sometimes

Evils of an irresponsible ministry.

^b Sergeant's Government Handbook, 1890, p. 145.

¹ C. O. List, 1882, p. 195; Go-

vernor Robinson's Report in Reports on the Colonies for 1881, dated June 28, 1882.

Balance
of consti-
tutional
forces.

from the other.’^j This has been exemplified in numerous instances in the colonial history of the British empire. From the experience thus acquired we may learn to appreciate ‘the value of that just balance of constitutional forces which it is the glory of the English race to have more nearly realised than any other that lives upon the earth, but which can never be perfect until human nature is perfect.’^k

^j Constitutional History of the L. (P.) 1881, p. 16.
Bermudas, a paper by Lt.-Gen. Sir
J. H. Lefroy, governor of Bermuda. ^k *Ib.* p. 18.



CHAPTER IV.

PRACTICAL OPERATION OF PARLIAMENTARY GOVERNMENT IN THE BRITISH COLONIES.

IMPERIAL DOMINION EXERCISABLE OVER SELF-GOVERNING COLONIES.

In the appointment and control of governors.

THE authority of the Crown over the colonies of Great Britain is directly administered through the secretary of state for the colonies. This officer is primarily and personally responsible, both to the sovereign and to the Imperial Parliament, for all official acts of any colonial governor,^a notwithstanding the operation of the rule of collective responsibility, which renders the whole administration liable for the acts of the several members of which the governing body is composed. For the ancient maxim still holds good, that 'the constitution of this country always selects for responsibility the individual minister who does any particular act.'^b

Secretary
of state
for the
colonies.

The supremacy of the Crown over colonies which possess representative institutions, and have been further intrusted with the privileges of local self-government, by the incorporation into their political system of the principle of 'responsible government,' is ordinarily exercised only in the appointment and control of the governor as an Imperial officer; and in the allowance or

^a Todd, Parl. Govt. v. 2, pp. 520, 522, new ed. pp. 638, 641.

^b *Ib.* p. 376, new ed. p. 471.

disallowance in certain cases of the enactments of the local legislature.

Appoint-
ment of
governors.

The secretary of state for the colonies has the privilege of recommending, for the sanction of the sovereign, suitable persons to fill the office of governor: subject, however, to the approval of the prime minister, whose opinion, especially in the case of the more important governorships, would have much weight.

Case of
Sir Henry
Blake.

In 1881 the government of Queensland raised an objection to the appointment of Sir Henry Blake to the governorship of the colony, and claimed the right of being allowed an opportunity of expressing an opinion, before any governor was appointed, that the same might meet with the approval of the colonists generally.^c

New South Wales and South Australia joined issue with their sister colony in this contention; while Victoria formally dissented from the principle of having anything to say in the selection of a governor.

New Zealand and Tasmania made no representation in the matter. Canada submitted, though not officially, 'that the Dominion government are decidedly of opinion that the appointment of a governor-general should be made without any reference to the responsible ministers.'^d

As a result of the action taken by the Queensland government, Sir Henry Blake resigned the governorship of that colony, and was appointed governor of Jamaica.

The secretary of state for the colonies, in reply to the representations from Queensland, New South Wales, and South Australia, claiming the right of being informed as to the selection of the person chosen by the Imperial government to fill the office of governor, stated in a despatch dated July 8, 1889, that 'it appears, indeed, to be necessary on every ground that her Majesty's government should conduct, without assistance from the colony, the confidential negotiations preliminary to the selection of a governor, while they could not invite a person so selected by them to allow his name to be submitted for the approval of gentlemen at a distance, to whom (though well and favourably known here) he may be altogether unknown. I can, therefore, only repeat that the true interests of the colonies, and the preservation of friendly and constitutional

^c Corresp. respecting appointment of governor in colonies under responsible government. Com. Pap. 1889, v. 55, p. 10.

^d *Ib.* p. 26.

relations between the colonies and this country will, in the opinion of her Majesty's government, be best secured by adhering to the principles upon which the appointment of governor has hitherto been made.^e

While the Irish party in Queensland were at the bottom of the movement objecting to the nomination of Sir Henry Blake, the protestant element in the colony of Newfoundland, in 1887, from similar motives, had objected to the appointment of Sir Ambrose Shea to the governorship of that colony. To overcome this difficulty, Sir Ambrose was posted to the Bahamas to relieve Sir H. Blake, who was sent to Newfoundland in his stead.^f

Sir A.
Shea.

It is said that South Australia, at this time, declined to receive Lord Normanby, the matter being quietly settled before going too far.^g Also that Natal, in 1882, had objected on other grounds to the appointment of Mr., afterwards Sir W., Sendall, which resulted in Sir Henry Bulwer filling the office.^h

Lord
Nor-
manby.

Sir W.
Sendall.

Colonial governors are appointed by letters patent under the great seal. As the preparation and issue of these formal and authoritative instruments usually takes considerable time, it became the practice, prior to the year 1875, to issue a minor commission, under the royal sign-manual and signet, to a newly appointed governor, empowering him, meanwhile, to act under the commission and instructions given to his predecessor in office. But doubts having been raised in certain cases, whether these minor commissions effectually authorised the holder to perform all the duties and functions appertaining to his office, it was in 1875 deemed expedient by her Majesty's government, under the advice of the law officers of the Crown, to issue, on behalf of each colony of the empire, letters patent constituting permanently the office of governor therein; and providing that all future incumbents of this office should be appointed by special commission under the royal sign-manual and signet to fulfil the duties

Their
commis-
sion and
instruc-
tions.

^e Corresp. respecting appointment of governor in colonies under responsible government. Com. Pap. 1889, v. 55, p. 26.

^f Dilke, Problems of Greater Britain, v. 1, p. 338.

^g *Ib.* p. 366.

^h *Ib.*

Governor's instructions, Canada.

New instruments for governors of Canada.

of the same, under the general authority and directions of the letters patent aforesaid, and of the permanent instructions to be issued in connection therewith.

But, before introducing this change, a circular despatch, dated Oct. 20, 1875, was addressed to all colonial governors, inclosing a copy of the proposed new forms, and inviting suggestions to be submitted by the governor, after consultation with his responsible ministers, for such alterations as might appear to them to be specially advisable in the case of the particular colony.

Upon the receipt of this despatch by the Earl of Dufferin (governor-general of Canada), he referred it to a committee of the privy council for consideration. And on April 6, 1876, his lordship forwarded to the Earl of Carnarvon (colonial secretary) a memorandum, drawn up by the Hon. Mr. Edward Blake (minister of justice), and by a sub-committee of the privy council, which embodied various important suggestions in regard to the proper form of a permanent commission and instructions for the office of governor-general of Canada.

Approving of the idea of a revised and permanent form for these instruments, Mr. Blake nevertheless submitted that the peculiar position of Canada, in relation to the mother country, entitled her to special consideration, and that the existing forms, while they might be eminently suited to other colonies, were inapplicable and objectionable in her case. For Canada is not merely a colony or province of the empire ; she is also a dominion, composed of a number of provinces federally united under an Imperial charter or Act of Parliament, which expressly recites that her constitution is to be similar in principle to that of the United Kingdom. In addition to large powers of legislation and government over the confederated provinces, this dominion has been intrusted with absolute powers of

legislation and administration over the people and territories of the north-west, and of other parts of British North America, out of which she has already created, and is empowered further to create at discretion, new provinces with representative institutions, to be hereafter admitted to share in the privileges now assigned to the older provinces.¹ Canada, therefore, is undoubtedly entitled to 'the fullest freedom of political government'; and her rights, in this respect, should be recognised and embodied in the authoritative documents of the commission and instructions from the Crown to the governor-general.

Governor's instructions, Canada.

In conformity with this idea—the correctness of which could not be disputed, and which was frankly admitted by her Majesty's government—Mr. Blake suggested numerous alterations from the forms heretofore in use, and submitted reasons in favour of the amendments proposed.

Changes proposed therein.

As a foundation principle, necessary to be asserted and maintained in any instrument which might be issued for the purpose of defining the powers of a governor-general in Canada, Mr. Blake contended that it ought to be clearly understood that, 'as a rule, the governor does and must act through the agency (and upon the advice) of ministers; and ministers must be responsible for such action,' save 'only in the rare instances in which, owing to the existence of substantial Imperial as distinguished from Canadian interests, it is considered that full freedom of action is not vested in the Canadian people.'

In a despatch dated May 22, 1876, Lord Carnarvon thanks the governor-general for the above-mentioned memorandum, and promises that the suggestions contained therein shall receive due consideration, when

¹ See *post*, p. 577.

Governor's instructions, Canada.

the charter to incorporate the office of governor-general of Canada is being prepared.

About this period Lord Carnarvon had expressed a desire to have a personal conference with the Canadian minister of justice, in reference not only to the amended forms of the royal instructions and commission to the governor-general, but also on certain other public questions of importance, which had arisen out of the relations between Canada and the mother country.

Accordingly, upon a report of a committee of the privy council, approved by his excellency the governor-general in council, on May 29, 1876, Mr. Blake was deputed to visit England for this purpose. His report of his official action and intercourse with the colonial secretary was submitted to the Canadian government, and in the following year was laid before parliament. So far as the governor's commission and instructions were concerned, the expression of Mr. Blake's views on this subject elicited from Lord Carnarvon the observation that these suggestions appeared to his lordship to be of much importance, not only with reference to the dominion, but as applicable also to the circumstances of some other colonies. Ere long, Lord Carnarvon hoped to be in a position to inform Lord Dufferin that he was prepared to advise an amendment of the existing commission and instructions, in general accordance with Mr. Blake's representations.¹

On February 10, 1877, Lord Carnarvon transmitted to Lord Dufferin drafts of letters patent, constituting the office of governor-general of the dominion of Canada; of the royal instructions to accompany the same; and of a commission appointing a governor-general. His lordship intimated that these instruments had been

¹ For Mr. Blake's Report, and with, see Canada Sess. Pap. 1877, the correspondence connected there- No. 13.

expressly framed so as to meet the views of the Canadian ministers, and he invited their opinion upon the result. No time was lost, by Lord Dufferin, in replying to this communication. On March 8 his excellency forwarded to the colonial secretary a minute of council, and a report from the minister of justice (Mr. Blake), expressing a general approval of the terms of these drafts; but suggesting certain alterations therein, which, if carried out, would render them entirely acceptable.

Governors' instructions.

Lord Carnarvon, in his reply to this despatch, dated April 9, 1877, expresses his pleasure at the approbation with which the drafts had been received, and his belief that there would be no difficulty in arriving at a mutually satisfactory settlement of the few points still in debate. To this end he forwarded amended drafts, which were substantially in agreement with the changes suggested by Mr. Blake. He had, however, retained in a modified form the clause in the commission which indicates the independent action to be taken by the governor-general, in the exercise of the prerogative of pardon, in cases of an Imperial nature; because, 'when interests outside of the dominion are directly affected, there is no authority except the Imperial authority which is in a position to decide.'

Prerogative of pardon.

In answer to the foregoing despatch, Lord Dufferin, on June 14, 1877, transmitted to Lord Carnarvon a minute of council and memorandum from Mr. Blake, representing that the specified changes in the draft commission and instructions were for the most part quite satisfactory; but yet submitting the expediency of transferring the clause concerning the administration of the prerogative of pardon from the commission of the governor to his instructions, so as to admit of occasional modifications of the rule in exceptional cases;

also, suggesting the omission of a word in this clause, which involved no material principle.

New drafts
agreed
upon for
Canada.

On November 8, 1877, Lord Carnarvon writes to Lord Dufferin, accepting unreservedly the amendments proposed in the preceding communication. Whereupon, on December 13, Lord Dufferin forwards another minute of council, recommending that the new drafts should be promulgated previous to the approaching session of the Canadian parliament. Lord Carnarvon, however, in a despatch dated January 10, 1878, replies that, in conformity with established practice, her Majesty's government consider that it would be better to postpone the issue and promulgation of the revised and permanent letters patent, commission, and instructions until a new appointment to the office of governor-general of Canada shall be made.^k

New instruments
for South
Australia.

Meanwhile, the intentions of her Majesty's government, as hereinbefore explained, to make permanent provision for the discharge of the office of governor, in the various dependencies of the British Crown, were being carried out in other parts of the empire.

In April, 1877, upon the appointment of Sir W. F. D. Jervois to be governor and commander-in-chief of South Australia, the Imperial government took occasion to revise the customary form of the governor's commission, and of the royal instructions accompanying the same. Letters patent were issued, under the great seal of the United Kingdom, and by warrant under the Queen's sign-manual, constituting the office of governor and commander-in-chief in and for this colony. This instrument was accompanied by a draft of instructions passed under the royal sign-manual and signet, to the governor for the time being of South Australia, or, in his absence, to the lieutenant-governor,

^k For this correspondence, see Canada Sess. Pap. 1879, No. 181.

or officer administering the government of the said colony. By these official documents, permanent provision was made for the execution of the office of governor in South Australia, and the commission afterwards issued, nominating Sir W. F. D. Jervois to fill this post, merely recites the letters patent, and appoints him, during the royal pleasure, to be governor in and over the colony, 'with all and singular the powers and authorities granted to the governor of our said colony, in our letters patent' afore-mentioned; and authorises him to exercise and perform the same, 'according to such orders and instructions as our said governor for the time being hath already, or may hereafter receive from us.' The commission thus concludes: 'and we do hereby command all and singular our officers, ministers, and loving subjects in our said colony and its dependencies, and all others whom it may concern, to take due notice hereof, and to give their ready obedience accordingly.'¹

Governors' instructions.

Similar letters patent, constituting the office of governor and commander-in-chief of the colony of the Cape of Good Hope, together with instructions to the said governor, were issued under the royal sign-manual and signet, on February 26, 1877; and on the following day a royal commission was issued appointing Sir H. Bartle Frere to be the governor of the said colony.^m Similar letters patent, making permanent provision for the office of governor and commander-in-chief in and over the colony of New Zealand and its dependencies, were issued on February 21, 1879, and the following day a commission passed under the royal sign-manual and signet appointing Sir Hercules Robinson governor of the colony, in succession to the Marquis of Normanby.ⁿ Similar documents concerning the office of governor in Tasmania were issued on June 17, 1880,^o and to the governor of Natal, first issued on February 16, 1882.^p

¹ For the revised letters patent, instructions, and new commission, see South Australia Parl. Proc. 1877, No. 109.

^x Cape of Good Hope Assem.

Votes, 1878, Annexures A. 8.

ⁿ N. Zealand Parl. Pap. 1879.

^o Tasmania Leg. Coun. Pap. 1880, No. 86.

^p Com. Pap. 1882, v. 47, p. 369.

Governors' instructions.

The instructions accompanying the South Australian letters patent, and intended to be of general application to future incumbents of the office of governor in that colony, are in the main an embodiment of the instructions heretofore issued for the guidance of governors in and over all colonies in the enjoyment of local self-government. They express the mind and will of the Imperial government, in regard to the proper duties of a governor and his relation to his ministers, as the same have been authoritatively declared in similar instruments, issued since the introduction of responsible government into our colonial system.^a

Commission and instructions to the Marquis of Lorne.

But these instructions are necessarily more restrictive in their character than those which were afterwards framed in reference to Canada. Mr. Blake's contention, 'that there is no dependency of the British Crown which is entitled to so full an application of the principles of constitutional freedom as the dominion of Canada,' was admitted to be correct by her Majesty's government; and the official instruments made use of, in the appointment, on October 7, 1878, of the Marquis of Lorne to be governor-general of Canada, clearly indicate, in their substantial omissions, as well as in their positive directions, the larger measure of self-government thenceforth conceded to the new dominion. This increase of power, to be exercised by the government and parliament of Canada, was not merely relatively greater than that now enjoyed by other colonies of the empire, but absolutely more than had been previously intrusted to Canada itself, during the administration of any former governor-general.

This will be obvious, upon a perusal of the correspondence between Lord Dufferin and the secretary of

^a See *ante*, p. 34; *post*, p. 125.

state, from April 6, 1876, to January 10, 1878, above referred to, together with the report submitted by Mr. Blake to the governor-general in council, on the same subject, on September 5, 1876.^r

Governors' instructions.

A brief mention of the chief points of difference between the commission and instructions issued to the Marquis of Lorne, and those furnished to his predecessors in the office of governor-general, will suffice to establish this proposition.

In his suggestions for the revision and improvement of these authoritative documents, Mr. Blake had dwelt at considerable length upon the necessity of modifying the royal instructions in regard to the exercise of the prerogative of mercy. This subject, however, will specially call for consideration in a subsequent part of this treatise; suffice it here to say that Mr. Blake's arguments for a change of constitutional practice, in this particular, substantially prevailed, and are embodied in the new instructions.

Other portions of the governor's commission and instructions, heretofore invariably inserted in documents of this description, were omitted from the revised draft agreed upon for use in Canada, on the ground that they were obsolete or superfluous and unnecessary. Of this character we may refer to the directions concerning the meetings of the executive, or privy council, and the transaction of business by that body; the clause which authorised the governor, in certain contingencies, to act in opposition to the advice of his ministers; the clause which prescribes the classes of bills to be reserved by the governor-general for Imperial consideration; and certain clauses dealing with matters which now come within the purview of the provincial governments, and are dealt with by local legislation,

Alterations in the revised formularies.

^r Canada Sess. Pap. 1877, No. 13. *Ib.* 1879, No. 181.

Governors' instructions.

over which the governor-general and his advisers practically exercise no control.

All such questions, it was wisely contended by Mr. Blake, should be left to be determined by the application to them, as they might arise, of the constitutional principles involved in the establishment in Canada of parliamentary government. The authority of the Crown in every colony is suitably and undeniably vested in the governor. He possesses 'the full constitutional powers which her Majesty, if she were ruling personally instead of through his agency, could exercise.' 'The governor-general has an undoubted right to refuse compliance with the advice of his ministers; whereupon the latter must either adopt and become responsible for his views, or leave their places to be filled by others prepared to take that course.'

Even in respect to questions which may involve Imperial as distinct from Canadian interests, it appeared to Mr. Blake unadvisable, if not impossible, to formulate any rule of limitation for the conduct of the governor-general. 'The truth is,' he observes, 'that Imperial interests are, under our present system of government, to be secured in matters of Canadian executive policy, not by any such clause in a governor's instructions (which would be practically inoperative, and if it can be supposed to be operative would be mischievous), but by mutual good feeling, and by proper consideration for Imperial interests on the part of her Majesty's Canadian advisers; the Crown necessarily retaining all its constitutional rights and powers, which would be exercisable in any emergency in which the indicated securities might be found to fail.' He therefore suggested the omission of all clauses, in the royal instructions to governors of Canada, which were of this nature. The sections of the British North America Act, defining and regulating the exercise of the powers

which appertain to the office of governor-general in a system of government expressly declared by that statute to be 'similar in principle to that of the United Kingdom,' were in Mr. Blake's judgment amply sufficient to determine the constitutional status and authority of that officer; subject, of course, 'to any further instructions, special or general, which the Crown may lawfully give, should circumstances render that course desirable.'^s

Governors' instructions.

These propositions, advanced by Mr. Blake, were for the most part accepted and approved by her Majesty's government, and led, as we have seen, to the introduction of material alterations in the form and substance of the commission and instructions to colonial governors, particularly in reference to the dominion of Canada.

But while the revised and amended formularies, since promulgated for the regulation of the office of governor in Canada, in South Australia, and in other colonies, have been framed more in accordance with the actual political relation of these several colonies to the mother country, it is important to observe that they do not abate or relinquish one iota of the rightful supremacy of the Crown, as the same may be constitutionally exercised in any part of the Queen's dominions, upon the advice of responsible ministers.^t

Revised formularies maintain supremacy of the Crown.

Any further comment that may be necessary, in regard to the changes effected by the new drafts of these authoritative instruments, may be suitably reserved for consideration in connection with the special points in question, to be hereafter examined.

We will now briefly indicate the contents of the letters patent constituting the office of the governor-

^s Canada Sess. Pap. 1877, No. 13, p. 8. secretary) in Hans. D. v. 244, p. 1812.

^t Sir M. Hicks-Beach (colonial

Governors' instructions.

general of Canada, of the royal instructions accompanying the same, and of the commission appointing the Marquis of Lorne to fill this office, as the same were transmitted to the Senate and Commons of Canada, on February 19, 1879.^u

Power of governor-general of Canada.

By his letters patent the governor-general of the dominion of Canada, for the time being, is authorised and commanded by the Queen 'to do and execute, in due manner, all things that shall belong to his said command, and to the trust we have reposed in him, according to the several powers and authorities granted or appointed him by virtue of "The British North America Act, 1867," and of these present letters patent, and of such commission as may be issued to him under our sign-manual and signet, and according to such instructions as may, from time to time, be given to him, under our sign-manual and signet, or by our order in our privy council, or by us through one of our principal secretaries of state; and to such laws as are or shall hereafter be in force in our said dominion.'

He is also authorised and empowered to keep and use the great seal of Canada 'for sealing all things whatsoever that shall pass the said great seal.'

And to constitute and appoint, in the name and behalf of the sovereign, 'all such judges, commissioners, justices of the peace, and other necessary officers and ministers of our said dominion, as may be lawfully constituted or appointed by us.'

And 'upon sufficient cause to him appearing,' to remove or suspend from office any person holding any office under the Crown in Canada, so far as the same may lawfully be done.

And 'to exercise all powers lawfully belonging to us in respect of the summoning, proroguing, or dissolving the parliament' of Canada.

^u Canada Sess. Pap. 1879, No. 14.

And under the authority of the British North America Act, aforesaid, to appoint any person or persons, jointly or severally, to be his deputy or deputies within any part of Canada, to exercise such of the powers or functions of the governor-general as he may please to assign to him or them.

Governors' instructions.

And 'in the event of the death, incapacity, removal or absence' out of Canada of the governor-general, all his powers shall be vested in a lieutenant-governor, or administrator, to be appointed by the Queen, under her sign-manual and signet, or if none such have been appointed, 'then in the senior officer for the time being in command of our regular troops' in Canada; after such person shall have duly taken the oaths prescribed to be taken by the governor-general.

'All our officers and ministers, civil and military, and all other the inhabitants of our said dominion,' are required 'to be obedient, aiding and assisting unto our said governor-general,' or the administrator, &c., in his absence.

By the last clauses of the letters patent, full power is reserved to revoke, alter, or amend the same, at any time; and provision made to insure that they shall have due publicity in Canada.

The royal instructions for the execution of the office of governor-general of Canada begin by reciting the letters patent, aforesaid, and enjoin the governor-general for the time being to cause his commission to be read and published in the presence of the chief-justice or other judge of the supreme court, and of the members of the dominion privy council, and require him to be duly sworn upon entering upon the duties of his office.

General instructions to governor-general of Canada.

They also require him to administer, or cause to be administered, the necessary oaths to all persons who shall hold any office or place of trust in the dominion.

To communicate these and any other instructions he may receive to the dominion privy council.

Governors' instructions.

To transmit to the Imperial government copies of all laws assented to by him in the Queen's name, or reserved for the signification of the royal pleasure; with suitable explanatory observations and copies of the journals and proceedings of the parliament of the dominion.

The only other clauses contained in these instructions concern the exercise by the governor-general of the prerogative of pardon—which (it has been already remarked) will receive due consideration in an appropriate part of this treatise—and forbid his quitting the dominion, ‘without having first obtained leave from us for so doing, under our sign-manual and signet, or through one of our principal secretaries of state.’

Commission appointing governor-general.

The royal commission appointing the Marquis of Lorne to be governor-general of the dominion of Canada is dated Oct. 7, 1878. It simply recites the letters patent aforesaid, and confers upon Lord Lorne this office, with the powers and authorities belonging to it, according to such orders and instructions as have already been, or may hereafter be, communicated to him from the sovereign; and commands ‘all and singular our officers, ministers, and loving subjects in our said dominion, and all others whom it may concern, to take due notice hereof, and to give their ready obedience accordingly.’

Special instructions to governors.

Every colonial governor, after his appointment to office, is subject to the control of the Crown as an Imperial officer. In addition to the permanent and general instructions which he receives in connection with his commission, he may, from time to time, be charged with any further instructions, special or general, which the Crown may lawfully communicate to him, under particular circumstances. The medium of communication between the sovereign and her representative, in any British colony, is the secretary of state.

Colonial governors invariably hold office during the

pleasure of the Crown ; but their period of service in a colony is usually limited to six years, from the assumption of their duties therein ;^v although, at the discretion of the Crown, a governor may be re-appointed for a further term.

Their
term of
service.

The rule which limits the term of service of a governor to six years was established principally for the purpose of insuring in governors the utmost impartiality of conduct, by disconnecting them from fixed relations with the colony over which they are appointed to preside. It was first made applicable to all British colonies by a circular despatch from Mr. Secretary Huskisson, issued in May, 1828, as follows : 'It shall for the future be understood that, at the expiration of six years, a governor of a colony shall, as a matter of course, retire from his government, unless there should be some special reasons for retaining him there ; and that the way should thus be opened for the employment of others, who may have claims to the notice of his Majesty's government.'^w

During the temporary absence of a governor from his colony, it was formerly the general practice for the Crown, by a dormant commission under the sign-manual, to empower the chief-justice or senior judge therein to act as administrator of the government. But difficulties having sometimes arisen in carrying out an arrangement of this kind, it is not now invariably resorted to, at least, in the first instance. Instead of this provision to supply the place of an absent governor, it is now customary either to appoint a lieutenant-governor, or administrator of the government, under the royal sign-manual ; or else that the senior officer for the time being of her Majesty's regular troops in the colony shall be empowered to act in this

Provision
for ab-
sence of a
governor.

^v Col. Reg. 1891, No. 7.

^w Com. Pap. 1836, v. 39, p. 633 ; Todd, v. 2, p. 524, new ed. p. 643.

capacity. But where no such provision has been made, it is usual and appropriate for the chief-justice or senior judge to be authorised to act as administrator of the government, in the event of the death, incapacity, removal or departure from the government of the governor and (if there be such an officer) of the lieutenant-governor of the colony.^x

Communica-
tions
to a go-
vernor
from Im-
perial go-
vernment.

X In matters of Imperial concern, or which may affect the well-being of the colony as a part of the empire, it is the duty of the secretary of state, as the constitutional mouthpiece of the sovereign, to correspond with colonial governors—communicating the opinions of her Majesty's government, and making whatever recommendations or suggestions he may deem to be expedient, 'either for the instruction of the governor, for the information of his ministers, or for the welfare of the colonial subjects of the Crown.'^y Opportunities for such advice or interposition will naturally become less frequent and imperative, in proportion as the institutions of government in any colony become settled and in harmonious operation.) In matters of local concern, within the legitimate jurisdiction of a self-governing community, the opinion of the Imperial government is seldom obtruded, and never insisted upon. And in well-established colonies, in possession of the full measure of local responsibility, despatches from her Majesty's

* Col. Reg. 1891, Nos. 6 and 7, the Marquis of Lorne's letters patent, as governor-general of Canada, in 1878. See also the correspondence in New South Wales Votes and Proc. 1874, pp. 95-108. *Ib.* 1875-76, v. 2, p. 19. South Australia Parl. Proc. 1875, v. 3, No. 35. *Ib.* 1877, p. 1, and App. Nos. 48 and 109. New Zealand Off. Gazette, Sept. 9, 1880.

Provision in respect to the salary payable to a governor on his first

appointment, and to the division of the same with one temporarily serving in that capacity before the arrival of the governor in his colony, or during his absence on leave, is made in Col. Reg. ch. v. See also correspondence on this subject between the governor and acting governor of Queensland and the secretary of state, Queensland Leg. Coun. Jour. 1872, p. 777.

^y Amos, 50 Years Eng. Const. p. 418.

colonial secretary, in reply to communications from the governor, narrating the progress of events under his administration, are usually confined to a brief acknowledgment of the receipt of such intelligence, and to the expression in general terms of the opinion entertained by her Majesty's government of the governor's proceedings.

It is likewise incumbent upon the secretary of state to be the medium of conveying to all governors of colonies and other dependencies of the Crown specific instructions for their guidance in the fulfilment of their respective charges. These instructions are issued by the sovereign, under the royal sign-manual. They are, as has been already observed, primarily of a general nature, and are addressed to the governor, upon his first assumption of office.^z Subsequent instructions are transmitted to the governor, from time to time, as may be necessary; or are embodied in 'circular despatches,' which are addressed to governors generally, although sent to each one individually.

Conveyed
by the
secretary
of state.

For example see the 'circular despatch,' of June 28, 1843, in regard to the imposition of differential duties by colonial legislatures; and that on martial law, which was laid before Parliament in 1867; and that on the exercise of the prerogative of mercy, presented to Parliament in 1877. See also the circular despatch of March 8, 1870, on the transmission of despatches, in Col. Reg. 1882, sec. 177.

^z See the royal instructions to the Duke of Richmond, upon his appointment, in 1818, to be governor-in-chief in and over Upper and Lower Canada. (Com. Pap. 1837-38, v. 39, p. 794.) *Ib.* to Mr. C. Poulett Thomson, as governor-gen. of Canada, Lords' Pap. 1840, v. 7, p. 359, and Can. Leg. Assem. Jour. 1841, p. 390. To Governor Sir E. Head, *ib.* 1854-55, p. 791; to Lord Monck, *ib.* 1862, Sess. Pap. No. 29, and again after confederation, Can. Sess. Pap. 1867-68, No. 22; to Sir J. Young, *ib.* 1870, No. 51. For

royal instructions to governors in Nova Scotia and other maritime colonies of British N. Am. from an early date, and for instructions for Earl of Durham, governor-in-chief, in 1838, Can. Sess. Pap. 1883, No. 70. *Ib.* to the Earl of Dufferin, as governor-general of the dominion of Canada, dated May 22, 1872. (Canada Com. Jour. 1873, p. 85.) Royal instructions to the governor of South Australia, dated April 28, 1877. (South Australia Parl. Proc. 1877, No. 109.)

Channel
of com-
munica-
tion with
Imperial
authori-
ties.

The governor of a colony is the proper channel for receiving and for transmitting to the secretary of state all representations of a public or private nature which are intended to be submitted to the Imperial government. As a rule, every letter, memorial, or other document which may be received from a colony by the secretary of state, otherwise than through the governor, will be referred back to the governor for his verification, and (if it should concern the affairs of the colony from whence it was written) his report.

Ample directions in regard to the order and method of correspondence between the governor of a colony and the colonial office will be found in Chapter VII. of the 'Rules and Regulations for her Majesty's Colonial Service,' issued in 1891.^a

In 1878 Sir G. Grey (ex-governor of South Africa, but then residing in New Zealand) addressed a letter to Lord Beaconsfield (prime minister) in relation to public affairs in South Africa. This letter was forwarded direct. It was thankfully received; but at the same time Sir G. Grey was notified that it ought to have been transmitted through the governor. Sir G. Grey protested against this rule, because similar communications were often sent to the premier in England by private individuals. But he was informed that, in the colonies, the rule was imperative.^b

Official de-
spatches.

By the royal instructions, governors are forbidden to give to any person copies of despatches they may receive from the secretary of state—or to allow copies to be taken of them—unless under a general or special authority from that officer. But where responsible government is established, the governor is considered to be at liberty to communicate to his advisers all despatches not marked 'Confidential.' And by a circular, dated July 10, 1871, despatches are reclassified,

^a C. O. List, 1891, p. 344. Case of the Jamaica Assen. Memorial to the Queen, Lords' Pap. 1864, v. 13, p. 350.

^b N. Zealand House Jour. 1880, App. A. 1, pp. 15-17, 26; A. 2, pp. 9, 37, 48.

as follows : (1.) *Numbered* despatches, which a governor may publish, unless directed not to do so. (2.) *Secret*, which he may, if he thinks fit, communicate, under the obligation of secrecy, to his ministers, and may even make public, if he thinks it necessary. (3.) *Confidential*, which are addressed to a governor personally, and which he is forbidden to make known, without express authority from the secretary of state.^e

Despatches.

In laying despatches and other papers before the legislature, the governor of a colony is bound by constitutional practice. In general, the governor in colonies with responsible ministries takes no personal action, in this matter, in the case of 'numbered' despatches and ordinary papers, and is rarely even consulted. The ministers lay before the legislature any such documents, on their own discretion and responsibility.^d But it is a general and reasonable rule of the public service that despatches and other documents forwarded to the Imperial government should not be published until they shall have been received and acknowledged by the secretary of state; and that no confidential memorandums passing between ministers and the governor should be laid before the colonial parliament, except on the advice of the ministers concerned.^e

Presentation of despatches to local parliament.

When advised to do so by his ministers, the governor should lay 'any numbered and not confidential despatch' addressed by him to or received by him from the secretary of state before the local parliament; unless there be some strong reason to the contrary, such as a pending reference to the secretary of state.^f

^e Col. Reg. 1891, No. 188.

^d New Zealand House of Rep. Jour. 1871, App. v. 1, p. 14; New Zealand Parl. Deb. v. 8, p. 140.

^e Governor Bowen's answer to an address of Leg. Council of Victoria, dated Jan. 24, 1878; Com. Pap. 1878, v. 56, pp. 832, 878, 887.

And see Todd, Parl. Govt. v. 1, pp. 279, 603, new ed. pp. 357, 440; and Lord Ellenborough's case, *ib.* v. 2, p. 383, new ed. p. 196.

^f Colonial secretary (Lord Carnarvon's) despatch, Jan. 26, 1878; Tasmania Leg. Council Jour. 1878, App. No. 36, p. 11.

Ministerial responsibility.

But the governor must first be advised by his ministers before taking such a step; and they must be prepared to defend his action if it be impugned.

Ministers cannot relieve themselves from the responsibility of advising as executive councillors; nor is a governor free to act without or against ministerial advice, in cases not involving the rights or prerogatives of the Crown or Imperial interests. Ministers must be willing to accept entire responsibility to the local parliament for any acts of a governor which have led to the resignation or dismissal of an outgoing ministry,^g though such responsibility on the part of ministers does not oblige them to defend particular views or statements contained in a governor's despatches or confidential memorandums.^h

Policy of withholding despatches.

Thus, on February 10, 1879, the governor of Tasmania, having requested that certain numbered despatches received by him from the secretary of state might be immediately laid before the colonial parliament, was informed by his ministers 'that they are unable to discover any grounds of public policy requiring the publication of these despatches, and after due consideration are unanimously of opinion that it is undesirable to accede to his excellency's request.'ⁱ Upon this occasion the views of his excellency the governor, upon the particular question, were in accord with his ministers'; though, for the sake of avoiding further unnecessary discussion of a controverted case, he objected to lay the despatches before parliament. Subsequently, however, the legislative council having specially applied for the production of all the papers in the case, ministers advised their publication. In concurring with this request 'the governor points out to ministers, as he did to their predecessors, that, whatever may be his personal views, he (in matters not involving Imperial interests or the prerogatives of the Crown, directly or indirectly) considers his responsible advisers to be answerable to parliament for advising the production of despatches, and for the

^g See Lt.-Gov. Gordon's Minute of May 1, 1866; N. Brunswick Assm. Jour. 1866, p. 211.

^h Governor Weld, Memo. for his ministers, of Oct. 29, 1877. Tasmania Leg. Council Jour. 1877,

Sess. 4, App. No. 35, p. 6; approved by Lord Carnarvon, in despatch of Jan. 26, 1878.

ⁱ Tasmania Leg. Coun. Pap. 1878-79, No. 114.

policy of such production, but does not consider that such responsibility renders it incumbent on them to defend any view or statement therein expressed by the governor.^j

It rests with the secretary of state in every instance to decide whether 'confidential' despatches may or may not be made public.^k

Confidential despatches.

On May 16, 1867, a motion was made in the legislative assembly of Queensland for an address to the governor asking for a copy of his despatch to the secretary of state for the colonies, transmitting a petition from certain residents in the colony requesting the governor's recall—in consequence of his interposition to prevent certain proceedings on the part of his ministers which were at variance with the royal instructions, and which interposition led to the resignation of ministers—and also for a copy of the reply to this despatch. Whereupon the premier pointed out that, by the royal instructions, all governors are prohibited from giving copies of their despatches, unless with the sanction of the secretary of state. The despatches in question were 'confidential,' and had not even been perused by the premier. Nevertheless, he assumed the responsibility of advising the governor that, in his opinion, it was unnecessary to produce them. The motion was accordingly negatived on a division.^l

When communicated to parliament.

On August 19, 1873, Governor Fergusson, of New Zealand, transmitted a message to the legislative council of the colony, declining to lay before that body 'all correspondence' which had passed between himself and the secretary of state, on a particular question, as such a proceeding would establish a practice hitherto unprecedented.^m

On November 25, 1874, a motion was made in the legislative assembly of New South Wales, condemnatory of the conduct of ministers in laying before the house Governor Robinson's minute, to themselves, upon the exercise of the prerogative of mercy in a certain case, and also reflecting upon the tenor of the minute itself, which, it was alleged, contained an implied censure upon the legislative assembly. This motion was negatived by the casting vote of the speaker.ⁿ Shortly after parliament was dissolved. The new parliament was convened in January, 1875. In the debate

Governor Robinson's confidential minute to ministers.

^j Tasmania Leg. Coun. Pap. 1878-79, No. 117.

^m New Zealand Leg. Coun. Jour. 1873, App. No. 4.

^k Col. Reg. 1891, No. 184.

ⁿ New South Wales, Leg. Assem.

^l Queensland, Parl. Deb. 1867, Votes and Proc. 1874, p. 54. p. 164.

Governor
Robin-
son's con-
fidential
minute.

upon the address in answer to the speech from the throne, an amendment, similar to the motion above mentioned, was carried against ministers. Whereupon they resigned. In reply to the address, the governor (in the interval between the resignation of his ministers and the appointment of their successors) transmitted a message to the assembly, dated February 2, wherein he defended his conduct in this matter, and asserted the constitutional rights of his office, whilst expressing due respect and consideration for the opinions of the legislative assembly, and a readiness to accept their decision, so far as it affected his late ministers. Unable to succeed in the endeavour to form a new administration of different material, the governor was obliged to send for Mr. Robertson, who, as leader of the opposition in the assembly, had induced the house to agree to the aforesaid amendment to the address. But in his memorandum to Mr. Robertson, the governor—while admitting the right of the house to condemn the ex-ministry for their own act, in laying his excellency's minute upon the table—protested against the rest of the amendment, as being 'not only a personal imputation upon himself, but an invasion of the constitutional rights of his office.' Mr. Robertson accepted the position offered to him, and became premier of a new ministry. The governor duly reported his own proceedings to the secretary of state (Earl Carnarvon), who, in a despatch dated April 26, 1875, expressed his approval of his excellency's conduct; including the terms of the message of February 2, when he was without constitutional advisers. The colonial secretary had previously, in a despatch dated March 20, 1875, freely accepted the governor's explanations in regard to his minute, above mentioned, and his assurance that he had not intentionally reflected therein upon the legislative assembly.*

Confiden-
tial de-
spatches
on Victo-
ria 'dead-
lock.'

During the continuance of the 'dead-lock' between the legislative chambers in the colony of Victoria, in 1877-78, arising out of differences in regard to the powers of the two houses in the appropriation of public money, the governor (Sir G. Bowen), on January 31, 1878, telegraphed the secretary of state (Earl Carnarvon) as follows: 'It would do much good if I might, in compliance with advice of ministers and address from legislative assembly, present to parliament the confidential despatches written in 1867 and 1868 by Lord Canterbury, or extracts from them, which bear upon the present crisis. Please telegraph your answer.' In reply, dated February 9, the colonial secretary expressed his wish to delay deciding on this application until he had received further

* Com. Pap. 1875, v. 53, pp. 682-696.

information on the subject. On February 22 he sent a message to the governor, 'Telegraph your reasons for desiring to publish . . . despatches which, being confidential, I am disposed to think had better be withheld.' Accordingly, on March 1, Governor Bowen replied: 'Lord Canterbury's despatches during the last dead-lock, specially those referred to in my confidential despatch of September 28, define the position and mutual relations of the council and assembly, and their presentation to parliament here would now do good.' Whereupon, on March 6, the colonial secretary (Sir M. Hicks-Beach) answered: 'I will not refuse consent to publication, under advice of ministers, of any public despatches on Darling case, and of confidential reports mentioned in your despatch of September 28—except despatch of April 26, 1868, and paragraph referring to it in despatch of May 23, 1868, which I think better withheld. But ministers must be responsible if any matter so published gives offence or causes difficulties.'^p

Victoria
'dead-
lock.'

On the same day, March 6, 1878, the legislative assembly of Victoria addressed the governor, praying him to present to parliament any hitherto unpublished despatches of Lord Canterbury, written during the parliamentary dead-lock of 1866-68. On March 19 Governor Bowen informed the assembly by message, 'that having asked and received permission accordingly from the secretary of state, he now transmits herewith copies of the despatches referred to.'^q

In January, 1878, the legislative council of Victoria passed an address to the governor (Sir G. Bowen) asking for a copy of a ministerial memorandum upon the position of affairs arising out of the parliamentary crisis in the colony, which had been communicated by the premier to the governor, and transmitted by him to the secretary of state for the colonies. The governor declined to present this memorandum, on the ground that 'it is a general and reasonable rule of the public service that documents forwarded to the Imperial government should not be published until they shall have been received and acknowledged by the secretary of state.' On March 6 the governor (having been notified by telegram that the secretary of state had received and considered this paper) caused a copy of it to be laid before both houses. Whereupon the legislative council addressed the governor on the points urged in the memorandum, and found fault with the course taken by his excellency in respect to the same. This address was referred to the ministry for their

Confiden-
tial com-
munica-
tions be-
tween
ministers
and the
governor.

^p Com. Pap. 1878, v. 56, pp. 752, 754, 761, 762.

^q Victoria Leg. Assem. Votes and Proc. 1877-78, v. 1, pp. 296, 301,

App. B. No. 15. For a summary of the contents of these despatches, see *post*, pp. 722, 723.

Confiden-
tial com-
munica-
tions.

consideration and advice. They characterised the reflection therein upon the governor as 'unfounded and gratuitous.' They regarded the memorandum as a confidential communication sent by ministers to the governor, which, without their consent, ought not to be communicated to either house of parliament. They had advised the withholding of that document in the first instance from the council, being of opinion 'that it would be impossible to carry on the executive government if either house of parliament had the right to insist on the immediate production of any documents of a confidential character placed by them in the hands of the governor.' The council, in asking for a copy of the memorandum, were 'actuated, doubtless, by a desire to produce disunion between the governor and the ministry.' 'Had their application been granted, ministers would have considered that a breach of confidence had been committed,' that their advice had been disregarded, and they would have at once resigned.'

Removal
or transfer
of gover-
nors.

Governors of colonies, holding office during the pleasure of the Crown, are removable at any time before the expiration of their ordinary term of office, if it should appear advisable to the Imperial government to recall them. Sometimes colonial governors are transferred to other colonies, on personal considerations of fitness, or ability to cope with circumstances of peculiar difficulty.

Sir Bartle
Frere.

On March 19, 1879, the secretary of state for the colonies addressed a despatch to Sir Bartle Frere, governor of the Cape of Good Hope, reproving him for entering upon a war with the Zulus, without the previous sanction and authority of her Majesty's government. But while it was thought necessary to animadvert with some severity upon the conduct of Sir Bartle Frere in this instance, the government, mindful of his eminent public services, were unwilling to supersede him; being convinced that his continued retention in office was, upon the whole, most desirable, notwithstanding his presumed error of judgment on this occasion. The policy of the government, in still retaining the government of South Africa in the hands of Sir Bartle Frere, after their condemnation of his proceedings in the despatch of March 19, 1879, gave rise to a motion of censure in the House of Lords, on March 25, which was directed alike against Sir Bartle Frere and her Majesty's govern-

ment. After a long debate, however, the motion was negatived by a large majority. But in April, 1880, a change of ministry occurred. The opponents of Sir Bartle Frere, in the House of Commons, clamoured for his immediate recall. The new ministry, however, determined to leave him at his post until the Cape parliament should have pronounced upon the question of confederation. But the local assembly having decided that the time was not opportune for the further consideration of the confederation scheme, Sir B. Frere was thereupon removed. Before his departure he addressed a despatch to the colonial secretary, dated August 3, 1880, vindicating his conduct and policy, and explaining the circumstances which led to the temporary postponement of the question of South African union.^s

Sir Bartle Frere.

In further illustration of the control which is exercised by her Majesty's secretary of state over colonial governors as Imperial officers, the following precedents are given:—

In 1848, Sir William Denison, governor of Van Diemen's Land (now known as Tasmania), addressed a formal complaint to the secretary of state against Sir John Pedder, chief-justice of the superior court in that colony, for alleged neglect of duty, in not having examined and certified the validity of certain acts passed by the governor in council, thereby giving occasion to much confusion and litigation. The governor had previously caused the chief-justice to be tried on this charge, before himself and the executive council, under the Imperial Act of the 22 Geo. III. c. 75. But, at this trial, the judge had been acquitted. Whereupon, a number of residents in the colony petitioned the Queen, complaining of the conduct of the governor in invading the independence of the bench, and for other arbitrary proceedings, and soliciting redress. This petition was forwarded to the colonial secretary through the governor, pursuant to the royal instructions in such cases.^t In reply, the secretary of state directed the governor to inform the memorialists that their petition had been laid before the Queen, but that her Majesty was not pleased to make any order thereon.^u And, upon a motion in the House of Commons to censure the governor for his conduct in this case, the secretary of state defended him.^v Never-

Sir W. Denison on neglect of duty.

^s Com. Pap. S. African affairs, presented in June, August, and September, 1880.

^u Com. Pap. 1847-48, v. 43, p. 681; *ib.* 1849, v. 35, p. 77.

^v Hans. D. v. 104, p. 378.

^t Col. Reg. 1891, Nos. 217-223.

theless, in a confidential despatch, he reprimanded Sir W. Denison for having 'acted rashly and unadvisedly' in this matter—a reproof which the governor understood 'as a sort of hint to him not for the future to meddle with judges, except in case of absolute necessity.'^w

Sir George Grey on unjustifiable complaints to Imperial authorities.

During the progress of the Maori war in New Zealand, in 1865 and 1866, certain allegations of inhumanity in dealing with the Maoris were reported to the secretary of state for war, by a gentleman in England, upon the authority of a private letter received by him from a colonel commanding one of the regiments on active service in New Zealand. These charges tended to implicate not only the military authorities, but also the governor of the colony (Sir George Grey) and his executive council, in suggesting or approving the alleged acts of inhumanity. Upon being made acquainted with the circumstances, the secretary of state for the colonies wrote confidentially to the governor for explanations. In reply, Sir George Grey addressed an indignant disclaimer of the truth of the charges, and enclosed a minute he had laid before his executive council on the subject, wherein he denounced the statement made to the secretary for war as a 'base and wicked calumny.' The minute concludes by stating that he should transmit a copy of it to the colonial secretary, and demand as his right that copies of the letters in which the charge was preferred should be communicated to him, with the name of the accuser, 'and that a full inquiry be instituted into the whole matter; and he declines to receive the communication as a confidential one.' Upon the receipt of this despatch and minute, the secretary of state for the colonies wrote to Sir G. Grey that he could 'be hardly unaware that this is not the tone or manner in which the officer representing the Queen ought to communicate with the minister from whom he receives her Majesty's commands; and that he hoped, upon reflection, the governor would see the propriety of recalling the objectionable minutes and despatch he had written on this painful question. Whereupon, the governor, without receding from the position he had taken in regard to these unfounded charges against himself and his ministers, expressed 'the fullest and most unreserved apology' for the passages in his despatch which were considered to have been couched in improper language. This retraction was received with satisfaction by the colonial secretary.^x

Meanwhile, the writer of the letter upon which the complaint against the New Zealand government was based had ascertained

^w Com. Pap. 1847-48, v. 43, pp. 624-670. Denison's Viceregal Life, v. 1, pp. 74, 97.

^x Com. Pap. 1867-68, v. 48, pp.

495-500.

that his censures were unfounded; and he wrote to the war office, desiring to withdraw his hasty and ill-considered charges. But Governor Grey was of opinion that stricter regulations were necessary, in order to prevent vexatious and unjustifiable complaints from being received and entertained by the Imperial authorities, without the knowledge of the governor, and without his being afforded previous opportunity of refuting them. He therefore accompanied his apology by a separate despatch of the same date (Feb. 1, 1867), wherein he called the attention of the colonial secretary to the evasion of the spirit of the rule of her Majesty's colonial service, which prohibits complaints against a governor to be made otherwise than through the governor himself. He also pointed out the irregularity of permitting military officers on active service in a colony to report to the secretary of state for war direct upon matters which concern the local government, and without their knowledge. On Aug. 2, 1867, the legislative council of New Zealand voted a resolution of thanks to the governor, 'for the prompt and able manner in which he has vindicated the honour of the government of New Zealand from the unfounded charges made against it' on this occasion; and at the same time they resolved that 'the mode of correspondence which has been adopted, and the course generally which has been pursued,' by the Imperial government in this matter, were calculated to impair the authority of the governor, and to act prejudicially as well to her Majesty's service as to her New Zealand subjects. These resolutions were duly forwarded to the secretary of state, to be laid before the Queen. The house of representatives of the colony agreed to similar resolutions, and to an address to the Queen, which emphatically complained of a practice that had grown up in some of the Imperial departments of state, of receiving letters from Imperial officers in the colony, impugning the conduct of the governor and his advisers, all knowledge of which had been withheld from the governor himself, and which made further representations, that were humbly submitted to her Majesty's consideration. In reply, the colonial secretary acknowledged the receipt of these papers, but stated that her Majesty had not thought fit to give any directions concerning them.^y Subsequently, however, clear and satisfactory regulations were established, in regard to military and naval correspondence in the colonies, which will prevent the recurrence of the evils complained of by the New Zealand government and legislature, and will at all times suffice to uphold the dignity and authority of the governor, as

Sir G. Grey on unjustifiable complaints to Imperial authorities.

^y Com. Pap. 1867-68, v. 48, 500-520, and see Rusden, *Hist. N. Zealand*, v. 2, p. 355.

representing the sovereign, in every colony of the empire.² During the progress of the Kaffir insurrection, at the Cape of Good Hope, in 1878, these new regulations were duly observed by the Imperial military authorities employed therein, with the most gratifying results.³

Sir
Charles
Darling's
conduct.

In 1865, the assembly of the colony of Victoria endeavoured to pass a new customs tariff, which embodied the principle of protection to native industry, to which it was known that a majority in the legislative council was opposed, by tacking the same to the annual appropriation bill. The legislative council, being debarred by the constitutional act from amending a bill of supply, rejected, by 'laying aside' the whole measure; previously endeavouring, though unsuccessfully, by means of a conference, to obtain an opportunity of expressing an unfettered judgment on the tariff question. Accordingly, the legislature was prorogued, without either the grant of supplies or the enactment of the tariff. The difficulties which arose out of these proceedings were undoubtedly brought on by an overstrained exercise of their powers, on the part of both the deliberative chambers, and should have been met by earnest endeavours on the part of the governor (Sir Charles Darling) to induce both sides to agree to such concessions as might be in accordance with the true spirit of the constitution, and by a resolute determination on his part to sanction no step which was not strictly authorised by law.

But, instead of adhering to this constitutional course, the governor—with no desire to favour any particular party or set of men, but from lack of firmness and discretion—yielded to the pressure put upon him by his ministers, on whose advice the assembly had acted; sanctioned the levy of the new duties, upon the mere resolution of the assembly; permitted his ministers to contract a loan with a bank to obtain money for public purposes; and approved of the payment of official salaries without the authority of an act of legislature. In justification of these proceedings, he pleaded the usage of the Imperial parliament, and the extreme necessity of the case. But the secretary of state for the colonies (Mr. Cardwell), in a despatch dated Nov. 27, 1865, severely reprimanded the governor for these doings. He showed that he had misunderstood the Imperial practice; that immediate effect was given to resolutions of the House of Commons, in matters of supply and taxation, only when there was a fair presumption that the

² Col. Reg. 1891, Nos. 197-210. ³ Com. Pap. 1878, v. 56, pp. 121, 372.
For these regulations, see *post*, p. 281. And see *post*, p. 384.

House of Lords would approve of the same ; and that if they should afterwards disapprove, by rejecting a bill based on the resolutions in question, the duties collected in anticipation of their agreement were returned, and ceased to be levied. He pointed out the irregularity of permitting extraneous provisions to be included in a supply bill ; and of government incurring pecuniary obligations, or expending any public money (except under circumstances of extreme public necessity), without the previous authority of parliament. Finally, the colonial secretary declared 'that in these three respects, in collecting duties without sanction of law, in contracting a loan without sanction of law, and in paying salaries without sanction of law, the governor had departed from the principle of conduct announced by himself and approved by the colonial secretary—the principle of rigid adherence to the law. I deeply regret this. The Queen's representative is justified in deferring very largely to his constitutional advisers in matters of policy, and even of equity ; but he is imperatively bound to withhold the Queen's authority from all or any of those manifestly unlawful proceedings by which one political party, or one member of the body-politic, is occasionally tempted to endeavour to establish its preponderance over another. I am quite sure that all honest and intelligent colonists will concur with me in thinking that the powers of the Crown ought never to be used to authorise or facilitate any act which is required for an immediate political purpose, but is forbidden by law.' In conclusion, the secretary says : 'I have to instruct you in this, as in every other case, to conform yourself strictly to the line of conduct which the law prescribes.'^b

Sir C.
Darling's
conduct.

In a later despatch, dated February 26, 1866, the colonial secretary comments upon subsequent acts of Governor Darling, wherein he identified himself so completely with his ministers in their illegal acts, as to denounce the conduct of their opponents ; viz. of certain ex-members of the executive council who had petitioned the Queen, complaining of the conduct of the governor in sanctioning the illegal proceedings of his ministers in a most unwarrantable manner. He observes that 'it is one of the first duties of the Queen's representative to keep himself as far as possible aloof from and above all personal conflicts. He should always so conduct himself as not to be precluded from acting freely with those whom the course of parliamentary proceedings might present to him as his confidential

^b Com. Pap. 1866, v. 50, p. 695, and see p. 697 for another despatch, on the same subject, dated Jan. 26, 1866. For an instance of the firmness of Sir William Denison, when

governor of New South Wales, in 1860, in resisting similar unlawful conduct recommended by his ministers, see his *Viceregal Life*, v. 1, p. 497.

Dismissal
of Gover-
nor Dar-
ling.

advisers. While, on the one hand, it is his duty to afford to his actual advisers all fair and just support, consistently with the observance of the law, he ought, on the other hand, to be perfectly free to give the same support to any other ministers whom it may be necessary for him at any future time to call to his counsels.' He adds that inasmuch as the governor, by his own act, had placed himself in 'a position of personal antagonism towards almost all those whose antecedents point them out as most likely to be available in the event of any change of ministry,' it is impossible that he could with advantage continue to conduct the government of the colony. 'As soon, therefore, as your convenience will admit of your leaving the colony, I should wish you to place the government in the hands of General Carey, whose duty it will be to administer it until your successor shall be appointed. I trust that no occasion will arise in which it will be clear to his judgment that the advice of his ministers for the time being would involve a violation of the law. In such a case, it would doubtless be his duty to refuse compliance and to endeavour to obtain the aid of other ministers. Her Majesty's government have no wish to interfere in any questions of purely colonial policy, and only desire that the colony shall be governed in conformity with the principles of responsible and constitutional government, subject always to the paramount authority of the law.'^c

At this juncture, upon the advice of ministers, a dissolution of the parliament of Victoria took place. The new house of assembly gave a large majority to ministers, thereby justifying the opinion frequently expressed by Governor Darling to the secretary of state during the progress of this painful controversy, that an appeal to the constituencies would not tend to the solution of the difficulty which had arisen between the two houses, or warrant him in taking steps which might lead to the removal of the existing ministry from power.^d

After his receipt of the despatch of November 27, 1865, above cited, Governor Darling endeavoured, as far as possible, to retrace his steps, and to conform to the instructions of her Majesty's government. But matters had gone too far. His ministers took to themselves the censure officially laid upon the governor, and resented the action of the colonial secretary. They resigned office; not, indeed, with special reference to the interference of the Imperial government, but on account of the continued resistance of the legislative council to their financial measures. But the efforts to form a new ministry, which should bring about harmonious relations between the two houses, proved impracticable, and the late ministers

^c Com. Pap. 1866, v. 50, p. 701.

^d *Ib.* pp. 740, 749.

were reinstated in office.^e A better understanding, however, was at length arrived at, by mutual concessions on the part of both houses, and before the departure of Sir C. Darling he had the satisfaction of knowing that the long-continued struggle was, for a time at least, at an end.^f

Sir C.
Darling.

On May 25, 1866, 'the officer administering the government of Victoria' was notified of the appointment of the Hon. H. Manners Sutton (afterwards Lord Canterbury) to succeed Sir C. Darling as governor of the colony. Mr. Secretary Cardwell took this opportunity to reiterate the points wherein Sir C. Darling had failed to fulfil the trust committed to him to the satisfaction of the Imperial government, and to impress upon his successor the necessity of carefully abstaining from any illegitimate use of the powers conferred upon the governor by the Crown. Before his departure from England, Mr. Manners Sutton would have an opportunity of learning full particulars of the past controversy in Victoria, and of applying for all needful instructions for his future guidance from her Majesty's government. 'But in this, as in every case in which the working of representative institutions is in issue, the ultimate result must rest upon the forbearance, the judgment, and the public spirit of the inhabitants of the colony—and more especially upon the wisdom and temper of those by whom the deliberations of the colony are guided.'^g

On April 18 and 25, 1866, on the eve of his retirement from Victoria, Governor Darling addressed despatches to the secretary of state, containing an energetic protest against the injury to his public character involved in the reasons assigned for his removal from office, and expressing his intention of appealing for redress to the House of Commons. At the same time he forwarded to his executive council a lengthy official minute protesting against the decision of her Majesty's government. This objectionable proceeding was noticed in a despatch from the colonial secretary to Governor Manners Sutton, dated June 25, 1866, as inconsistent with Sir C. Darling's duty while still holding the Queen's commission as governor.^h

Governor
Darling
protests
against
his dis-
missal.

On March 20, 1866, a debate occurred in the House of Commons

^e Com. Pap. 1866, v. 50, pp. 709-793.

^f *Ib.* p. 796. And see *ib.* 1867-68, v. 48, p. 635.

^g *Ib.* p. 779.

^h *Ib.* pp. 795-828; *ib.* 1867, v. 49, p. 557. In a letter, addressed to the Earl of Carnarvon (Mr. Card-

well's successor as colonial secretary), dated Hampton Court, Sept. 12, 1866, Sir C. Darling explains why he had taken the step complained of, and declares that he had no intention to contravene established rules. (*Ib.* p. 617.)

Sir C.
Darling.

upon a motion for papers in reference to the 'dead-lock' in Victoria, wherein frequent reference was made to the despatches written by Mr. Secretary Cardwell during the progress of this protracted struggle, and to the reasons which occasioned the recall of Governor Darling. The result of this discussion was 'to draw forth, from every quarter of the house, the warmest encomiums on the course pursued' by the colonial secretary, as having been 'moderate, wise, and well considered.' In this, and in several other questions of difficulty, the policy of the secretary of state 'had been such as to strengthen the influence of this country in her colonies, and to increase the confidence of the colonies in the mother country.'¹

The last act of Sir Charles Darling, previous to his departure from Victoria, was to transmit to the secretary of state for the colonies, on May 7, 1866, numerous petitions from inhabitants of Victoria, expressive of their high sense of the tact and wisdom displayed by Governor Darling in his conduct during the continuance of the crisis occasioned by the unhappy differences which prevailed between the two legislative chambers; deeply regretting his recall, and deprecating, in the strongest terms, 'the unnecessary interference of the secretary of state in the internal affairs of the colony.' The receipt of these petitions was acknowledged, in a despatch to Governor Mannors Sutton, without observation or comment.²

On May 16, 1866, when at Sydney, New South Wales—after having transferred the government of Victoria to the hands of Brigadier-General Carey, pending the arrival of the new governor, Sir J. H. Mannors Sutton—Sir C. Darling addressed a letter to the secretary of state, inclosing, for presentation to the Queen, a humble petition that her Majesty would be graciously pleased to appoint a tribunal before which the whole of his conduct as governor of Victoria, but especially that part of it upon which the alleged reasons for his recall were based, might be subjected to the strictest investigation. Upon his arrival in England, Sir C. Darling, in various letters to the newly-appointed colonial secretary (Earl Carnarvon) reiterated this request. In reply thereto, Sir C. Darling was repeatedly informed that his recall having been sanctioned by her Majesty, on the advice of the late government, Lord Carnarvon

¹ Hans. D. v. 182, p. 621. See Sir C. Darling's letter to Lord Carnarvon, of Sept. 11, 1866, in reply to certain statements made by Mr. Secretary Cardwell, in the course of this debate. Com. Pap. 1867, v. 49, p. 611. But in a later debate, in the House of Lords, on May 8, 1868,

the Duke of Argyll stated that Sir C. Darling's recall, by Mr. Secretary Cardwell, 'was assented to, not only by his own party, but by all parties in both Houses of Parliament.' Hans. D. v. 191, p. 1976.

² Com. Pap. 1867, v. 49, pp. 560, 591.

could not entertain the present appeal, or advise a compliance therewith. 'As to the effect which such a sustained decision may have upon your eligibility for a future appointment, or upon your retiring pension, his lordship will be ready, whenever these questions arise, to take that view of your long services to the Crown, and your general qualifications, which may best combine a due regard for the public service with your private interests.'^k

Sir C.
Darling.

Subsequently, Sir C. Darling claimed the right of appealing to the Imperial parliament for redress. Ministers declined to pledge themselves not to oppose the appeal; but agreed to an address for papers on the case. Neither house took action on the papers.^l

A review of the further proceedings arising out of the recall of Sir Charles Darling from the government of Victoria will lead us to the consideration of another important principle which has been established by her Majesty's government in reference to colonial governors; viz. the rule which forbids them to accept, for themselves or their family, any pecuniary or valuable present from the colony over which they have presided.

Governors
not to ac-
cept pre-
sents from
the co-
lony.

On May 3, 1866, a select committee of the legislative assembly of Victoria, appointed to prepare a farewell address to his excellency Sir C. Darling, and to report in reference to his removal from office, agreed to recommend that a parliamentary grant of twenty thousand pounds be made to Lady Darling, for her separate use, in consideration of the services which his excellency had rendered in the administration of the government of the colony, 'from which he has been recalled for political reasons only, and seeing that his removal will entail upon his family very heavy pecuniary loss.' Immediately upon being informed of this recommendation, Governor Darling sent a message to the assembly, to intimate that his family would not feel at liberty to accept the bounty of the parliament and people of Victoria until it shall be known whether her Majesty has any commands to signify therein, and until the governor shall have petitioned the Queen for an investigation into his conduct in office. The assembly, however, proceeded at once to vote an address to the Queen, praying her to

^k Com. Pap. 1867, v. 49, pp. 597, 610, 651, 664.

^l *Ib.* pp. 665, 667; see also the case of Lord Torrington, governor of Ceylon, discussed in Parliament

in 1849 and 1850; and the inquiry into conduct of ex-Governor Hineks in British Guiana. *Ib.* 1871, v. 20, p. 487; 1872, v. 43, p. 3.

Sir C.
Darling.

sanction the acceptance of the proposed grant to Lady Darling ; and the same was duly forwarded after Sir C. Darling's departure, through the officer administering the government of the colony.^m

On September 12 and 15, and on October 15, 17, and 20, 1866, Sir C. Darling, having learnt that the Victoria assembly had voted the aforesaid address, made application to the secretary of state urgently soliciting that no official obstacle might be interposed to prevent his wife from accepting the proposed grant, as the result of his recall had been to reduce him almost to a state of poverty. In reply, Sir Charles was informed that the Crown could not be advised to sanction the literal or substantial violation of the rule which declares that a governor should not receive pecuniary or valuable presents from the inhabitants of the colony over which he presides, either during the continuance of his service, or on leaving it ; and which rule has always been rigidly enforced. 'It is plain that such a rule would be merely nugatory if it were held that what the governor was precluded from receiving might properly be given to his wife.' It is impossible that the acceptance of the proposed gift should be regarded otherwise than as a final relinquishment by Sir C. Darling of her Majesty's service, and of all the emoluments or expectations attaching to it. An answer, to the same effect, was sent through the governor, in reply to the aforesaid address of the legislative assembly.ⁿ

Gover-
nors, and
their
family,
not to
receive or
give pre-
sents from
or to
colonists.

The rule in question first appears in the revised edition of the Colonial Regulations, issued in 1843 (No. 18), in the following words: A colonial governor 'is prohibited from receiving or giving presents on his own account.' In the new edition of the Regulations, issued in 1891 (No. 39), this rule is thus enlarged: 'He is prohibited from receiving presents, pecuniary or valuable, from the inhabitants of the colony, or any class of them, during the continuance of his office ; and from giving such presents ; and this rule is to be equally observed on leaving his office.' Following it is another, which provides that 'in cases where money has been subscribed, with a view of marking public approbation of the governor's conduct, it may be dedicated to objects of general utility, and connected with

^m Com. Pap. 1867, v. 49, pp. 559, 585.

ⁿ *Ib.* pp. 593, 619-623, 639-651.

the name of the person who has merited such a proof of the general esteem.'

Governors
not to
receive
presents.

'The principle is, that no governor shall be allowed to expose himself to the temptation which may arise from expecting beneficial donations from the colonists, or any section of them, or to the suspicions which arise from his acceptance of such donations. Whether they are made directly to himself, or in trust for him, or to some member of his family, so that he may have the enjoyment of them, is obviously immaterial.' But, while the reasons for this prohibition are self-evident, it has been officially explained 'that they rest on no considerations affecting the honour of gentlemen selected by the Crown to fill situations of this high importance, but on the necessity of preserving them, in the eyes of the public, free from all suspicion. These reasons apply to the receipt of presents of the same description by a governor on leaving his office with scarcely less force than during its continuance. And, although her Majesty's government cannot exercise any direct control over the actions of gentlemen on the point of leaving the public service, they feel it their duty to record this opinion, and to express their hope that it may be acted on as a general rule.'^o

Ex-governors
like-
wise.

On April 17, 1867, Sir C. Darling wrote the secretary of state for the colonies (the Duke of Buckingham) that, compelled by the increasing pressure of painful circumstances, Lady Darling had decided to accept the proposed grant from the legislative assembly of Victoria, and that, therefore, in accordance with the requirements of his grace's predecessor in office, Sir C. Darling finally relinquished the colonial service, and all the emoluments or expectations attaching to it. This determination was, at his request, made known to the governor of Victoria.^p

Proposed
grant to
Lady Dar-
ling, from
Victoria
assembly.

Whereupon his responsible advisers—who had hitherto refrained from urging any steps to give effect to the known desire of the

^o Com. Pap. 1867, v. 49, pp. 620, 663.

^p *Ib.* 1867-68, v. 48, p. 682.

Proposed
grant to
Lady
Darling.

legislative assembly to indemnify Sir C. Darling, through his wife, for his losses, in being recalled from the government of the colony, without receiving a pension or other compensation for past services—recommended Governor Manners Sutton to authorise, by message, the initiation of a grant of twenty thousand pounds to Lady Darling, in accordance with the address of the assembly, dated May 9, 1866. Deeming his consent to this recommendation to be merely ‘a formal act,’ necessary in order to afford to the assembly a constitutional opportunity of discussing the expediency of the grant, and not to be regarded as implying any personal opinion with respect to the policy of the proposal, the governor at once acted upon this advice; and on July 23, 1867, additional estimates, including the proposed vote to Lady Darling, were transmitted to the assembly, agreed to by that house, and included in the appropriation bill.^a

Legisla-
tive coun-
cil object
to this
grant.

The legislative council, however, took exception to this vote, and on account of it they rejected the appropriation bill. This renewal of the embarrassments of previous years was regarded by ministers as an attempt, on the part of the legislative council, to obtain, by indirect means, co-ordinate power with the assembly in dealing with the finances of the country. They did not, under existing circumstances, consider it advisable to recommend an appeal to the people by a dissolution of parliament, but agreed to advise an early prorogation, for a short period, so that at the re-assembling of parliament another opportunity might be afforded to the legislative council of considering the appropriation bill. The governor was unwilling to accede to this proposal. He intimated that he would rather, at once, place himself constitutionally in communication with those who had induced the legislative council to take this step. Acting upon this suggestion, the ministry resigned. The governor then applied first to one, and afterwards to another, prominent member of the legislative council, to assist him with their advice under the unusual circumstances which had arisen. He did not invite either of these gentlemen to become ‘a minister;’ neither did he adopt this ‘unusual course’ ‘because he desired to give to one political party a victory over the other, or to imply official or personal favour or disfavour for either, but because his advisers were admittedly and confessedly disabled, by the rejection of the appropriation bill, from conducting the administration of public affairs, as regards the satisfaction of pecuniary claims upon the government, in the usual and strictly constitutional manner.’ Moreover, the governor was not prepared to commission any gentleman to form a new government until he was previously satisfied that that step would

^a Com. Pap. 1867-68, v. 48, p. 630.

Proposed
grant to
Lady
Darling.

remove, or mitigate, existing embarrassments, as well as afford a prospect of restoring harmonious action in the legislature. The first member of the legislative council who was thus invited to advise with the governor in this emergency declined to act, because he considered that he was thereby asked to act as the governor's 'legal' and not as his 'constitutional' adviser. The other legislative councillor with greater propriety, and with a higher appreciation of the constitutional rights of a governor in a public emergency,^r agreed to put himself into communication with leading members of both houses, with a view to a settlement of existing embarrassments; but his efforts proved unsuccessful. Whereupon his excellency reinstated in their former position, as his responsible advisers, the administration whose resignations were still in his hands, but who, at his request, had continued to hold office until their successors should be appointed.^s

Agreeably to the advice tendered to him before their resignation, and repeated upon their resumption of office, the governor prorogued the legislature for eight days; temporary arrangements being agreed to meanwhile, to meet pressing current expenditure. The governor's course in this crisis, though it was not universally approved, was actuated by a desire 'to combine with strict obedience to the law, and an abstinence from any act which might be regarded as evincing personal or political favour or disfavour of a particular political party, a moderating influence with both.' This line of conduct in the difficult position in which he was placed was regarded by the colonial secretary as evincing a sound discretion, and he was encouraged to persevere in the course of entire neutrality which he had hitherto observed; 'not taking part with one side or the other in a controversy which must be locally decided. It is for the colonial legislature to discover, by common consent, some mode by which the present state of things can be put an end to,' before it 'results in discredit to the colony and injury to the public interest.'^t

Parliament was re-assembled on September 18. Ministers, however, would not consent to abate the claims of the assembly to include the proposed grant to Lady Darling as an item in the appropriation bill; and the governor did not hesitate to recommend the concurrence of the legislative council to this grant in a special message to that house. Otherwise, he refrained from interference in a matter which ought to be settled between the two chambers, and which it did not belong to the governor to determine. But the

^r See Todd, *Parl. Govt.* v. 1, p. 682-654.
226, new ed. p. 334.

^t *Ib.* pp. 633, 653, 675.

^s *Com. Pap.* 1867-68, v. 48, pp.

Proposed
grant to
Lady
Darling.

council, on the other hand, adhered to their own opinions, and again rejected the appropriation bill, because the obnoxious grant was inserted therein. This left ministers no alternative but to advise a dissolution of parliament, with a view to a final decision of the people upon the question at issue between the two houses.

The governor accepted this advice. Had it been possible instead to try the experiment of a change of ministry, with any prospect of success, he would not have hesitated to adopt this course in preference. 'But the displacement of ministers, supported continuously by a majority of the lower house, is a step which could not properly be taken by the governor without a fair prospect at least of that success by which alone, as is admitted by all constitutional authorities, such an exceptional exercise of the prerogative can alone be justified.' But, under existing circumstances, the governor had no reason to believe that a change of ministry would have produced harmony or co-operation between the two legislative chambers.^u

The prorogation took place on November 8. It would have been immediately followed by the dissolution, but for the exceptional circumstance of the impending arrival in the colony of his Royal Highness the Duke of Edinburgh, which made it undesirable to disturb, by an election contest, the joyful welcome and unanimous gratification of the people in such an auspicious event. The dissolution of parliament occurred on December 30. It resulted in the return of a large majority of members in support of the administration.^v

And here it should be stated that the legislative council based their repeated rejection of the appropriation bill, which included the objectionable grant to Lady Darling, not merely on the ground that it was an attempt, on the part of the assembly, to coerce them to agree to an extraordinary expenditure of which they disapproved, but also because, in their opinion, no such grant should have been submitted to the colonial parliament, as it was an attempt to reward an Imperial officer who had been recalled by the Crown from his government, and thereby a substantial evasion of the Imperial regulations affecting public servants. This view was an implied condemnation of the action of the governor in recommending the proposed grant to the consideration of parliament. The colonial secretary, however, though of opinion that the regulation in question ought to be upheld in its full meaning, and that its breach must be injurious, did not consider that the proposed grant, whatever might be thought of its policy or propriety, was 'so clear and unmistakable

^u Com. Pap. 1867-68, v. 48, pp. 666, 689.

^v *Ib.* pp. 665, 691

a violation of the existing rule as to call for the extreme measure of forbidding the governor to be party, under the advice of his responsible ministers, to those *formal acts* which are necessary to bring the grant under the consideration of the local parliament.'^w

The new parliament was summoned to meet on March 13, 1868, and ministers were prepared to recommend the inclusion, in the estimates to be submitted by message from the governor, of the proposed grant to Lady Darling; and there could be no doubt that this vote when passed would have been included in the appropriation bill, and thus sent up for the concurrence of the other house. But, at this juncture, the governor received a despatch from the secretary of state, dated January 1, which, while it expressed no disapproval of the course hitherto taken by the governor, under the very embarrassing circumstances wherein he was placed, regretted that the legislative assembly should have thought it advisable to include in the appropriation bill a grant exceptional in its character, and notoriously obnoxious to a majority of the upper house, instead of sending up that grant in a form in which it might have been fully and freely discussed. And, without positively directing the governor to adopt in future a different course, the despatch conveyed 'the opinion of her Majesty's government that the Queen's representative ought not to be made the instrument of enabling one branch of the legislature to coerce the other; and, therefore, that [he] ought not again to recommend the vote to the acceptance of the legislature, under the fifty-seventh article of the Constitution Act, except on a clear understanding that it will be brought before the legislative council, in a manner which will enable them to exercise their discretion respecting it, without the necessity of throwing the colony into confusion.'^x

Quarrel
between
the two
houses on
Lady Dar-
ling's case.

The receipt of this despatch, and its communication to the governor's constitutional advisers, introduced a new element of difficulty into the question at issue. Ministers had pledged themselves to their constituents to insist on the exclusive rights of the assembly in matters of finance; and they resented any attempt, on the part of the Imperial government, to abridge the discretion of the assembly as to the form of its grants to the Crown as a departure from the previous understanding, 'that the controversy must be locally decided.' While ministers were prepared to admit that no course coercive of the other house 'should be taken by the assembly which is not necessary for the maintenance of its rightful control

^w Com. Pap. 1867-68, v. 48, pp. 663, 678. And see *ib.* 1878, v. 56, p. 715.

^x *ib.* 1867-68, v. 48, p. 677. And

see, to the same effect, the despatch of Feb. 1, 1868 (*ib.* p. 678), and the debate in the House of Lords, of May 8, 1868.

Proposed
grant to
Lady
Darling.

over all matters of public finance, and which would not be taken by the House of Commons in the like case, they are bound to declare that the interference of the Crown, in a matter so completely within the discretion of the assembly as the form of a bill of supply, cannot be justified by precedent, and threatens the existence of responsible government in this country.' And, inasmuch as it appeared that the governor would not feel it consistent with his duty to the Crown to accept the advice of his ministers upon the subject of the grant to Lady Darling, without an understanding that, if the appropriation bill be rejected, it shall not again be submitted in that form to the council, ministers decided to resign. His excellency accepted their resignation, and then put himself into communication successively with various gentlemen, all of the opposite political party. These negotiations failed, because the governor would not pledge himself beforehand to grant them a dissolution, under certain hypothetical conditions. The governor then sought the help of a former supporter of the retiring administration, who undertook to construct a new ministry.⁷ This attempt likewise failed. But afterwards, Mr. Sladen was induced to accept the trust, and he succeeded. He took office with the understanding that the views entertained by the secretary of state, with respect to the form in which the proposed grant should be submitted for the approbation of the legislative council, should be carried out, and that the grant should be embodied in a separate bill, and not included in the appropriation act.

The policy of the Sladen administration was exemplified in the tenor of the speech from the throne upon the opening of parliament on May 29, 1868, wherein ministers had refrained from advising any recommendation in regard to the grant to Lady Darling to be included. But the supporters of the late administration determined at once to take the sense of the assembly upon the constitutional question involved in this new policy, by moving an amendment to the address in answer to the speech, which, after recapitulating the facts of the case, declared that the proposal of her Majesty's Imperial advisers, above-mentioned, upon a question which they had admitted 'must be locally decided,' was a violation of the constitutional rights of the legislative assembly, and a dangerous infringement of the fundamental principles of responsible government; and, furthermore, asserting that the assembly reserved for its own determination the question of the form of the grant to Lady Darling, and would withhold its confidence from any ministry that would not give full and immediate effect to its decision in respect to that grant. This amendment was agreed to, and embodied in the address to the

⁷ Com. Pap. 1867-68, v. 48, 695.

governor. In reply, his excellency pointed out that he was bound to adhere to his instructions from the Crown; but that he had not been required, and had no desire, to interfere with the constitutional right of the assembly to choose the form in which they would submit to the council the result of their deliberations in any matter of supply. Recognising that this question ought to be locally decided, and in pursuance of his instructions to observe a neutral position in this controversy between the two houses, the governor was prepared to acquiesce in any settlement of the question that could receive the concurrence of the three branches of the legislature.

Proposed
grant to
Lady
Darling.

Accepting this assurance from the governor, the assembly, nevertheless, on June 9, 1868, voted a want of confidence in the new ministry—because they had not as yet informed the house that they were prepared to advise an immediate grant to Lady Darling, and because they had refused to support the inclusion of such a grant in the appropriation bill. This vote caused the resignation of the Sladen ministry, and the return to power of Mr. McCulloch.

Fortunately, at this juncture, this protracted controversy was terminated by the act of Sir C. Darling himself, who sought and obtained permission from the secretary of state to withdraw his relinquishment of the colonial service of the Crown, on the ground that he had been under a misapprehension as to the views entertained by her Majesty's government, in regard to the acceptance by Lady Darling of the proposed grant, after he should have retired from the public service. This unqualified and unconditional withdrawal of his previous decision justified the Imperial government in conferring upon Sir C. Darling a retiring allowance as an ex-governor. But, as a condition upon the acceptance of this withdrawal, Sir C. Darling was required to write, for the information of the Victoria government, a letter intimating his inability, under these circumstances, to accept either for himself or his wife the proposed grant of twenty thousand pounds. This correspondence was laid before the Victoria parliament; whereupon, the long-continued dead-lock between the two houses came to an end.*

End of the
dead-lock.

In a debate in the House of Lords upon this question, which took place on May 8, 1868, just before it was brought to a happy termination, the secretary of state was blamed, by some eminent

* Com. Pap. 1867-68, v. 48, pp. 695-704. Victoria Leg. Coun. Jour. 1868, p. 105, App. A. 1. Leg. Assem. Votes and Proc. 1868, v. 1, App. B. Sir C. Darling was afterwards allowed a civil service pension of £1,000 per annum, commencing from Oct. 24, 1866. But in January,

1870, he died. The Victoria parliament then, upon a message from the governor, passed an Act, conferring a pension of £1,000 per annum upon his widow, and making provision for his four orphan children. Acts 1870, No. 362.

Governor's conduct questioned in Imperial Parliament.

statesmen, for not having interposed to prevent the governor from allowing the vote to be submitted to the legislature; at any rate, as a part of the bill of supply. But, practically, the governor would have been powerless to enforce such a restriction, in the face of the great preponderance of opinion in favour of the grant, both in the assembly and in the country generally. The first stage in the proceedings at which the governor could have suitably interposed to prevent any such grant, in a question of this kind, was after the bill, which he formally initiated, had passed both houses. He might then, under his instructions, have reserved the bill for the consideration of the Crown, as it involved a principle affecting one who had served as an Imperial officer, and in that capacity had ingratiated himself with the supporters of the measure. But if, in the first instance, the governor had resorted to his extreme right of forbidding the initiation of the vote, he would have turned the dispute from a constitutional issue raised between the legislative chambers, as to the appropriate limits of their respective powers and privileges—which shape it finally assumed—into a deplorable contest between the colony and the Crown.^a

In the Commons, early in May, 1868, Sir Roundell Palmer gave notice of a vote of censure upon the government for permitting the governor, notwithstanding Sir C. Darling's retirement from the service, to sanction the initiation of a pecuniary grant in his favour. The principle intended to be asserted in this motion was, that grants of money to retiring governors of colonies, by colonial assemblies (unless proposed with the spontaneous approval of the Crown, on grounds of public service, recognised as exceptional and meritorious by the Crown as well as by the assembly), are not only inconsistent with the regulations of the service, but are subversive of the true relations between the colonies and the empire, and ought under no circumstances whatever to be allowed. This motion was postponed for a time, and, after the settlement of the case affecting Sir C. Darling, was dropped. But the principle is obviously sound, and being advocated by so eminent a constitutional authority as Sir Roundell Palmer, quite independently of the personal question affecting Sir C. Darling, would doubtless have been endorsed by the House of Commons.^b

In conclusion, it may be observed that further light has been subsequently thrown upon this case, so important and instructive in many points of view, by the publication, specially authorised by government, of certain confidential despatches from Governor

Confidential despatches on this case.

^a See Adderley, *Colonial Policy*, p. 112.

^b *Com. Pap. 1867-68*, v. 48, p. 701.

Manners Sutton to the secretary of state, written between July 26, 1867, and August 16, 1868.^c

Proposed
grant to
Lady
Darling.

From these despatches, it appears that the governor—in the absence of definite instructions as to the course he ought to pursue with respect to the proposed grant to Lady Darling—succeeded in inducing the McCulloch ministry to postpone the tender to him of any advice thereupon, so long as Sir Charles Darling remained in the colonial service. But ministers yielded this point very reluctantly, fearing their inability to hold their supporters—the majority in the assembly—in check. When Sir Charles formally relinquished the service of the Crown, ministers insisted upon proposing a measure to reward him (through his wife) for his past services. The governor was aware that the legislative council disapproved of the proposal, but he knew that it was very popular with the assembly and in the country; and that if he appealed from his ministers and from the assembly, as he was entitled to do, such an act would be the signal for an overpowering manifestation of popular feeling in favour of ministers, if not of the grant; and the result of a general election would have been to leave him powerless in the hands of a majority, who would consider him as an aggressor, and as a beaten foe.

Moreover, the governor could not but confess that, without undervaluing the status of the legislative council, they were, in their persistent opposition to this grant, asserting a claim which the House of Lords, under similar circumstances, would not have preferred. The legitimate exercise of the legal rights of a legislative council should be defined by the practice, rather than by the abstract claims or undefined powers, of the House of Lords. Admitting that the legislative council was justified, by their opinion of the abstract demerits of the grant to Lady Darling, to oppose it, so long as they could do so consistently with a due regard to the maintenance of law and order, yet it was of the highest importance that they should not over-estimate or miscalculate their power of resistance. The governor believed that their continued resistance to the grant would lead to a popular demand to supersede or ignore their authority as an independent branch of the legislature, to which ministers would be apt to yield, and which would involve the governor, and ultimately the Imperial government, in a conflict; and probably endanger the relations of the colony with the mother country. He therefore eagerly availed himself of every opportunity—by inculcating moderation between the contending parties, and by enforcing

^c See Victoria Leg. Assem. Votes and Com. Pap. 1878, v. 56, pp. 927–and Proc. 1878, v. 1, App. B. No. 15; 937.

delay—to mitigate the pressure of the assembly on the legislative council, and to afford to the latter an opening for a dignified retreat. He even made full inquiries (not limited to members of his ministry) as to whether a change of ministry could induce the house to pass the proposed grant in a separate bill, instead of including it in the supply bill. But he found such a course to be impracticable. He had accordingly agreed—as the most considerate step yet open towards the legislative council—to the grant being inserted in the appropriation act. Both houses were undoubtedly disposed, on this occasion, to press their respective rights and privileges to extremity. But the assembly were sustained by the constituent body, who, as was unmistakably shown by the result of the general election in 1868, were decidedly adverse to any concession to the legislative council upon this question. If, under these circumstances, the council had proved stubborn and impracticable, the prolongation of the controversy between the two houses would undoubtedly have strengthened the extreme democratic party, and led to disastrous results.

We are therefore free to admit that, under circumstances of unparalleled difficulty, Governor Manners Sutton acted in a most exemplary and statesmanlike manner, combining firmness with moderation, and evincing a thoughtful regard for the interests of all who were concerned in the issue of the struggle.

Rule concerning presents further considered.

We must now revert to the further consideration of the rule forbidding the acceptance of presents by governors from the inhabitants of the colony over which they preside.

Sir W. Denison's case.

In January, 1855, upon the retirement of Sir William Denison from the governorship of Van Diemen's Land, and his promotion to be governor of New South Wales, the sum of two thousand pounds was subscribed by the people of the colony, to purchase a large silver centre-piece for a dining-table, to be presented, as a testimonial of regard for his public services, to Sir William. Upon his reporting this circumstance to the secretary of state, objections were made to the receipt, by an out-going governor, of any testimonial from the people; and it was with considerable difficulty that the colonial secretary was induced to permit Sir W. Denison to accept this gift. But his excellency called attention to the fact that, within his own knowledge, other governors had received testimonials under similar circumstances; and inasmuch as they had not thought it needful to report the same to the colonial secretary, the transaction had passed

without observation.^d Since the date of this occurrence, as we have already noticed, a stricter rule has been enforced in regard to such matters.^e

Presents
to
governors.

Moreover, by chapter xvii. of the Rules and Regulations for her Majesty's Colonial Service (ed. 1891), governors, lieutenant-governors, and all other servants of the Crown in a colony, are prohibited from receiving presents offered for their personal acceptance by kings, chiefs, or other members of the native population, in or neighbouring to such colony. When such presents cannot be absolutely refused without giving offence, they are to be delivered up to the government. No exception to this rule is allowed, unless with the express sanction of the secretary of state. Presents received in exchange, in ceremonial intercourse with native chiefs, &c., must be credited to the government, and such return presents as may be sanctioned by the secretary of state will be given at the government expense.

In 1871, Sir George F. Bowen, who was then governor of New Zealand, whilst on a tour of observation through the colony, was proffered, as a memento of his visit to the province of Otago, a beautiful work of art, carved in stone, by a native artist. It represented 'the Moka bird mourning the death of the Wax-eye,' and was adorned with figures of ferns and creeping plants in the background. But his excellency, though very sensible of the compliment to himself, refused to take the donation as a personal gift; deeming it to be 'unusual and improper for governors of colonies to accept such valuable presents for their own use and advantage.' Nevertheless, with the consent of the donor, he undertook that it should be deposited in the government house, as public property, and as a lasting memorial of interest to the colonists and to visitors from abroad. For it had always been his opinion that 'the government house should illustrate the natural products and resources of the colony, and the advance of its inhabitants in the useful and ornamental arts.'^f

Sir G.
Bowen's
case.

^d Denison, *Viceregal Life*, v. 1, p. 274.

^e See *ante*, p. 142.

^f *Com. Pap.* 1872, v. 43, p. 664.

All British officials forbidden to receive presents.

This wholesome rule, it may be observed, has been further extended and applied by the Imperial government to subordinate officials throughout the British empire, and especially in India, where, formerly, a laxity of practice in this particular had given rise to much abuse and corruption.^g In 1793, a law was passed, which is still in force, to forbid the receiving by any governor, or other person in public employ in India, any present, either directly or indirectly, under any colour or pretext. Offences against this act are punishable, as extortions and misdemeanors, by severe penalties, and by the forfeiture to the Crown of the gift or its full pecuniary value.^h It is a rule, in fact, of universal application to all state functionaries, of whatever grade or rank, in the service of the Crown.ⁱ

As to lieutenant-governor of Canadian provinces.

In regard to the application of this rule to lieutenant-governors of the provinces in the dominion of Canada, the secretary of state for the colonies, in a despatch dated May 8, 1869, observes that, 'while the governor-general is not at liberty to sanction the passing of a law making any donation or gratuity to himself,^j it would be for his ministers to consider whether they should advise him to consent to a donation by the province to the lieutenant-governor, and he would be at liberty to follow that advice.'^k

^g Mr. Disraeli, Hans. D. v. 225, p. 1146.

^h Lord Chancellor Cairns, Hans. D. v. 191, p. 1988. Act 33, Geo. III. c. 52, secs. 62, 63.

ⁱ See Ashley, Life of Palmerston, v. 1, p. 130. Law Times, v. 62, p. 164, citing C. J. Cockburn, in Mori-

son v. Thompson, Law Reports, 9 Q. B. 481.

^j Royal instructions to Lord Dufferin, as governor-general of Canada, No. 9.

^k Can. Sess. Pap. 1870, No. 85, p. 26.



CHAPTER V.

IMPERIAL DOMINION EXERCISABLE OVER SELF-GOVERNING
COLONIES: IN MATTERS OF LOCAL LEGISLATION.

THE right of the Crown, as the supreme executive authority of the empire, to control all legislation which is enacted in the name of the Crown, in any part of the Queen's dominions, is self-evident and unquestionable.

In the mother country the personal and direct exercise of this prerogative has fallen into disuse. But eminent statesmen, irrespective of party, and who represent the ideas of our own day, have concurred in asserting that 'it is a fundamental error to suppose that the power of the Crown to reject laws has consequently ceased to exist.' The authority of the Crown, as a constituent part of the legislative body, still remains; although, since the establishment of parliamentary government, the prerogative has been constitutionally exercised in a different way.^a

Royal
veto on
legisla-
tion.

But, in respect to the colonies, the royal veto upon legislation has always been an active and not a dormant power. The reason of this is obvious. A colony is but a part of the empire, occupying a subordinate position in the realm. No colonial legislative body is competent to pass a law which is at variance with, or repugnant to, any Imperial statute

Its active
exercise in
the colo-
nies.

^a See Todd, *Parl. Govt.* v. 2, pp. 316-319, new ed. pp. 390-393; and Earl Granville's remarks in *Hans. D. v.* 140, p. 284.

Crown
veto.

which extends, in its operation, to the particular colony.^b Neither may a colonial legislature exceed the bounds of its assigned jurisdiction, or limited powers. Should such an excess of authority be assumed, it becomes the duty of the Crown to veto, or disallow, the illegal or unconstitutional enactment. This duty should be fulfilled by the Crown without reference to the conclusions arrived at, in respect to the legality of a particular enactment, by any legal tribunal. It would be no adequate protection to the public, against erroneous and unlawful legislation on the part of a colonial legislature, that a decision of a court of law had pronounced the same to be *ultra vires*. An appeal might be taken against this decision, and the question carried to a higher court. Pending its ultimate determination, the public interests might suffer. Therefore, whenever it is clear to the advisers of the Crown that there has been an unlawful exercise of power by a legislative body, it becomes their duty to recommend that the royal prerogative should be invoked to annul the same.

The Crown, moreover, is the chief executive authority of the empire, and the instrument for giving effect to the national will, as the same has been embodied in acts of the Imperial Parliament, or sanctioned by Parliament, upon the advice of responsible ministers. It is the proper function of the Crown, therefore, to uphold and enforce the national policy throughout the realm; save only in so far as rights of local self-government may have been conceded to any portion thereof.

Furthermore, the Crown occupies, towards the colonial dependencies of the empire, a paternal relation, which, at least in the earlier stages of their political

^b See Merivale, *Of the Colonies*, p. 662. And see *post*, pp. 159, 171.

existence, justifies and requires that the mature experience and enlarged political insight of the statesmen who guide public affairs in the mother country should be utilised to the benefit of their fellow-subjects in the colonies, while they are gradually attaining to a knowledge of the practical business of legislation in their limited sphere. This will oftentimes necessitate the directing hand of Imperial statesmanship, to correct and regulate immature and unwise attempts at legislation, such as has occasionally proceeded from colonial legislatures before they had acquired the requisite knowledge and experience to enable them to discharge their responsible duties aright.

Beneficial effect of royal veto on colonial legislation.

Upon these grounds, it is impossible to gainsay the great public advantage which results from the possession by the Crown of the veto power. It is evident that the prerogative, by virtue of which the Crown is authorised to supervise and control the acts of all subordinate legislatures throughout the empire, is held for the especial benefit of the colonies, as well as for the security of the nation at large.

In the case of colonies having responsible government, this right of veto is, however, very sparingly exercised. Wherever that system has been introduced, her Majesty's government has, as a general rule, refrained from interfering with colonial legislation; except in cases specified in the royal instructions to the governors, which almost exclusively refer to matters of Imperial relation, and not of mere local concern.^c

Sparingly exercised under responsible government.

Return^d of (1) reserved bills which have been assented to or disallowed by her Majesty in council for each of the undermentioned

^c See Hans. D. v. 122, p. 914; v. 124, pp. 562, 575, 717. Canada Sess. Pap. 1869, No. 18. Lord Norton's paper, 'How not to Retain the Colonies,' Nineteenth Cent. v. 6, p. 170.

^d This return of the colonies, excepting Canada, was kindly furnished by Mr. John Bramston, C.B., assist. under secretary of state; that for Canada by the department of justice.

Crown
veto.

colonies from the commencement of their present constitutions to the end of 1890 ; (2) acts disallowed within the same periods :—

Colony	Reserved Bills			Acts Disallowed
	Total	Assented to	Disallowed	
Canada, Dominion of	15	14	1 ^d	1
New Zealand . . .	56	53	3	1
Victoria . . .	28	26	2	1
New South Wales . .	15	15	—	—
Queensland . . .	11	8	3	—
Tasmania . . .	19	16	3	1
South Australia . .	25	25	—	2
Newfoundland . . .	—	—	—	4
Cape of Good Hope .	6	6	—	—
Western Australia [†] .	—	—	—	—

Note.—Reserved bills which were not submitted for the assent or disallowance of her Majesty are not included in the above return. While only one bill is shown in above table to have been disallowed for Canada, *vide post*, pp. 177–184, for particulars of bills that did not receive the royal assent.^e

† Present constitution only dates from December, 1890.

But if her Majesty's ministers should be of opinion that any constitutional principle was infringed by a colonial enactment it would be their duty to advise that the royal veto should be put upon it; and they ought not to shrink from the performance of that duty for fear of possible consequences, in disturbing harmonious relations between the colony and the mother country.^f

Since the concession of responsible government to the principal colonies of Great Britain, as well as formerly, the Imperial government, while seldom resorting to the extreme measure of disallowing colonial acts, has repeatedly pointed out, in despatches from the secretary of state for the colonies to the governor of the colony,

^e A return of cases in which Crown veto has been applied to colonial bills was granted in House of Lords on Jan. 31, 1893. For the number of provincial bills disallowed by the federal government in Canada, see *post*, p. 530; see

post, p. 173, for acts disallowed in Canada prior to confederation.

^f Earl of Carnarvon, Hans. D. v. 191, p. 1983. See his lordship's despatch to governor of Queensland, of March 27, 1877, *post*, p. 188.

errors, defects, or omissions in colonial laws, which required to be remedied by further legislation;^g and has cautioned the colonial government as to the spirit in which certain exceptional powers, granted by a colonial act, which had been approved by the Imperial government, should be made use of, so as to avoid abuse or oppression.^h In this way, the paternal oversight of her Majesty's government has frequently been exercised, for the benefit of the colonies, without encroachment.

Imperial
advice to
colonies.

Subject, however, to the constitutional oversight and discretion of the Crown—by which all colonial legislation is liable to be controlled and annulled, if exercised unlawfully or to the prejudice of other parts of the empire—complete powers of legislation appertain to all duly constituted colonial governments. Every local legislature—whether created by charter from the Crown or by Imperial statute—is clothed with supreme authority, within the limits of the colony, to provide for the peace, order, and good government of the inhabitants thereof.ⁱ This supreme legislative authority is subject, of course, to the paramount supremacy of the Imperial Parliament over all minor and subordinate legislatures within the empire. The functions of control exercisable by the Imperial legislature are practically restrained, however, by the operation of certain constitutional principles hereafter to be considered. Meanwhile, it may suffice to observe that the right of local self-government conceded to all British colonies wherein representative institutions have been introduced, confers upon the local legislature, with the co-operation and consent of the Crown, as an integral part of such

Limits of
colonial
legislative
authority.

^g See Canadian precedents, in Canada Assem. Jour. 1843, p. 47; *ib.* 1847, App. W.; 1848, p. 45; 1849, App. N.; and 1851, App. ZZ. For precedents in other British North American colonies, see Com.

Pap. 1864, v. 40, pp. 690-708.

^h Canada Assem. Jour. 1866, p. 292.

ⁱ See Baron Parke's judgment, in *Kielley v. Carson*, 4 Moore's Privy. Coun. Rep. 85.

Bills that are *ultra vires* judicially interfered with.

institutions, ample and unreserved powers to deliberate and determine absolutely in regard to all matters of local concern.

In the event of a colonial legislature assuming to exercise powers in excess of its lawful competence—as, for instance, where a colonial statute conflicts with an act of the Imperial Parliament—and in case the Crown has not interposed to annul such unlawful acts, application could be made to the courts of law within the colony, to decide upon the proper limits of the jurisdiction belonging to the legislature in the particular instance.^j Such occasions of judicial interference are, however, of rare occurrence, save only under the Canadian constitution. The dominion of Canada comprises a federal parliament, with minor provincial legislatures, the respective powers of which are limited and defined by the British North America Act of 1867. In the working of this constitution, questions have frequently arisen as to the powers exclusively assigned either to the dominion or provincial authorities; and the determination of these questions has suitably devolved upon the courts of law. But this subject will be separately discussed in another part of this treatise.

To revert to the question immediately before us, namely, the exercise by the Crown of the veto power over colonial legislation.

A governor's duty in respect to bills.

Under the Rules and Regulations for the direction of her Majesty's Colonial Service, the governor in every colony has authority either to give or to withhold his assent to laws passed by the other branches of the legislature therein, and until that assent is given no such law is valid or binding.^k

^j See Berton, Sup. Ct. Rep. N. and see *post*, pp. 301, 534.
Bk. 2nd ed. by Stockton, p. 557, ^k Colonial Rules, 1892, sec. 48.

Royal assent, how given.

The royal instructions do not define the precise time¹ and circumstances under which the royal assent shall be given to bills passed by colonial legislatures, neither do they limit the action of a governor, in the exercise of this prerogative, to the usage of the sovereign in the mother country. Ordinarily, it has been usual for the governor to proceed to the legislative buildings for such a purpose, and to declare the royal pleasure upon bills passed, in presence of the legislative bodies. But sometimes it has been deemed expedient, during or at the close of a session, that the royal assent should be made known by proclamation,^m a course which is generally adopted in the case of bills reserved for the signification of the royal pleasure thereon.

'When bills have passed both houses, the King's royal assent is not to be given but either by commission, or in person, in presence of both houses.' This is a declaration of Sir Edward Coke, in 1621, quoted by Hatsell (vol. ii. p. 338), who shows 'that the law of this realm is, and always has been,' to this effect.

Agreeably to Imperial usage, it has been customary for the governor or governor-general in Canada to attend in state in the upper chamber for the purpose of giving the royal assent to bills, in the presence of members of both houses, specially summoned to appear before his excellency for that purpose ; but this practice is not

¹ Unless the constitution prescribes otherwise, the time is practically indefinite. *Ld. Carnarvon's* despatch, April 5, 1877; *Queensland Leg. Coun. Jour.* 1877, p. 297.

^m See the *Newfoundland Assem. Jour.* 1861, pp. 91, 92. Proclamation of governor of Tasmania of Sept. 30, 1875; *Tasm. Leg. Coun. Votes*, v. 21, p. 79, of March 11, 1880; *Tasm. Votes*, sess. 1879-80, p. 139. Proclamation of governor of Victoria of June 25, 1880, *Vic. Parl. Deb. in loco*. In the province of Quebec, in 1879, the royal assent was given

twice to a series of bills which had passed both houses. This anomalous and unnecessary proceeding was apparently accounted for and sought to be justified by the fact that the legislative assembly had adjourned over the day whereon the royal assent was first declared, though the legislative council was still in session. The cases cited in the text will suffice to show that the presence of both houses, when the assent of the Crown is declared to bills, is not required. *Quebec Leg. Coun. Jour.* 1879, pp. 205-220.

Royal
assent to
bills.

essential.ⁿ In South Australia the assent is ordinarily given in person in the legislative council chamber.

In Tasmania the legislative council thought fit to adjourn on March 5, 1880, for a period of three months. On March 9 the house of assembly adopted a resolution condemning the action of the legislative council as an unconstitutional exercise of power; and on March 11 the governor issued two proclamations, one assenting to the bills which had passed both houses, and the other proroguing parliament for three months and eleven days. On October 29, 1883, the governor assented to bills, and prorogued parliament by proclamation.

But in other Australian colonies a different practice has prevailed. In New South Wales, Western Australia, and in Queensland, bills, not being bills of appropriation, and in New Zealand and Tasmania all bills, without exceptions, are as a general rule assented to by the governor at his official residence, or office, in the presence merely of the clerk of the parliaments, or by proclamation; both houses being subsequently notified thereof by message under the sign-manual.

The proper formula (as given in the South Australia statutes, and in the votes of the Cape of Good Hope assembly and of Tasmania parliament) is, 'In the name and on behalf of her Majesty, I hereby assent to this bill.'

In Victoria it had been usual to follow the Imperial practice. But the attorney-general of Victoria has advised that 'the governor can legally and constitu-

ⁿ See the British North America Act, 1867, sec. 55, which leaves this question an open one in Canada. And see an exceptional instance in Canada of a contrary practice, proposed—owing to the illness of the governor—but eventually aban-

doned, because of his sudden decease, and the appointment of a deputy-governor, who assented to the bills in the customary way. Canada Assem. Jour. Sept. 17 and 18, 1841.

tionally give the royal assent at the government offices, or elsewhere, to all bills (except the appropriation bill) presented to his excellency by the clerk of the parliaments for her Majesty's assent.' 'Such assent, however, should afterwards be notified by message to both houses of parliament, according to the practice in other colonies.'^o Therefore, when it has been deemed expedient to bring a session of the Victoria parliament to a speedy close, the colonial rather than the Imperial practice has been resorted to.^p

Royal assent to bills.

In Canada, when it is required to put a bill into immediate force, after it has passed its third reading, it is customary for the deputy-governor to attend at the senate chamber, and there give the formal assent.

In Natal the assent is by message to the legislative council, and in the Cape of Good Hope by proclamation.

Every colonial governor, excepting the governor-general of the dominion of Canada,^a is directed by the royal instructions to reserve certain specified bills for the signification of her Majesty's pleasure thereon, or to give the royal assent to them only in the event of their containing a clause to suspend their operation until they have been confirmed by the Crown.^r

Bills reserved for consideration of the Crown.

Pursuant to the change in the tenor of the royal instructions to governors of Canada—first introduced in 1878, by the omission of any direction for the reservation of bills—an act passed by the Canadian parliament in 1879, to effect the judicial separation of certain parties from the bonds of matrimony, was assented to by the governor-general (42 Vic. 79), which act previously must needs

^o Victoria Leg. Coun. Jour. 1877-78, p. 160. But on Oct. 10, 1877, the assembly, by resolution, authorised their speaker to present the appropriation and loan bills to the governor, for the royal assent, at the government house. See also Vic. Assen. Votes, Sept. 11, 1879. And this is the customary practice in

Tasmania, and at the Cape of Good Hope.

^p See *ante*, p. 161.

^q As to this exception, see *ante*, p. 117.

^r See Stokes on the Colonies, p. 254. Col. Reg. 1892, No. 49, and see *post*, p. 169.

Bills reserved.

have been reserved for the signification of the royal pleasure thereon.

- Bills requiring to be thus dealt with are not defined alike in the instructions to all governors, but the instructions on this head refer generally to matters of Imperial concern, such as bills affecting currency, the army and navy, differential duties, the operation and effect of treaties with foreign powers, and any enactments of an unusual nature touching the prerogative, or the rights of the Queen's subjects not resident in the particular colony.^s

Sometimes the colonial secretary intimates to the governor of a colony, in regard to a bill which has been reserved for the signification of the royal pleasure, that until certain amendments thereto have been made, it will not be submitted for the assent of the Crown.^t

In recent instructions issued to the governors of colonies, for example, in those accompanying the letters patent constituting the office of governor of the Cape of Good Hope and of South Australia, these directions are defined in the following terms :—

- ✱ The governor is forbidden to assent in the Queen's name to any bills of the classes hereinafter specified: granting a divorce from the bonds of marriage; granting land, money, or other donation or gratuity, to himself; to make a legal tender of paper, or other currency except the coin of the realm, or other gold or silver coin; to impose differential duties (other than as allowed by the Australian Colonies Duties Act, 1873); which may contain provisions apparently inconsistent with obligations imposed on the Imperial Crown by treaty; which may interfere with the discipline or control of the Imperial army or navy; which may contain provisions of an extraordinary nature and importance, whereby the

^s Col. Reg. 1892, No. 33.

^t N. Zealand Pap. Sess. 2, 1879, A. 2 b.

royal prerogative, or the rights and property of British subjects not residing in the colony, or the trade and shipping of the United Kingdom and its dependencies, may be prejudiced; and any bill containing provisions, to which the royal assent has been once refused or which has been disallowed. Unless any such bill shall contain a clause suspending the operation of the same until the signification of the royal pleasure thereupon, or unless the governor shall have satisfied himself that an urgent necessity exists, requiring that such bill shall be brought into immediate operation, in which case the governor is authorised to assent thereto; except such bill shall be repugnant to the law of England, or inconsistent with any treaty obligations of the British Crown. But he is required to transmit to the sovereign any bill so assented to, by the earliest opportunity, together with his reasons for assenting to it.^u

Bills reserved.

Colonial Law Validity By an Imperial statute passed in 1865, it is provided that no colonial law, which has been assented to by the governor, shall be deemed to have been void by reason only of its being inconsistent with the tenor of any instructions applicable to the same, which may have been given to the governor by or on behalf of the Crown. Neither is a colonial law to be accounted repugnant to Imperial legislation, unless such legislation purports to extend to the colony.^v

Assent given contrary to instructions.

For it is not competent to the advisers of the Crown in England to recommend the sovereign to give her assent to any act passed by a colonial legislature, and reserved for the signification of the royal pleasure

^u Instructions to Earl Dufferin, dated May 22, 1872, sec. 9. Instructions to the governor (for the time being) of the colony of the Cape of Good Hope, dated Feb. 26, 1877. Instructions to the governor of South Australia, dated April 28, 1877.

^v 28 & 29 Vic. c. 63, sec. 4. This point had been previously decided by the Supreme Court of New Brunswick in *Reg. v. J. Kerr. Berton*, N. B. Rep. 370, and see *Bank of Australasia v. Nais*, 16 Q. B. p. 717.

Acts repugnant to Imperial legislation.

thereon, if the same should contain any provision directly repugnant to an existing Imperial statute. Even if such repugnancy be merely technical, an Act of Parliament must first be obtained before the colonial act can be assented to.^w

Legal advice taken by a governor before assenting to bills.

When the governor of a colony is advised by his ministers to give the royal assent to a bill passed by the colonial legislature, it is essential that he should be assured, upon proper authority, that the particular measure is within the competency of the legislature to enact; and that it is one which the royal instructions do not require that he should reserve for the signification of the pleasure of the Crown. Accordingly, it is customary, in every colony, for the governor to receive from the local minister of justice, or other law officers of the Crown, a report in reference to all bills to be submitted for his sanction, which specifies whether any legal objection existed to his assenting to them, or whether his duty and obligations, as representative of the Crown, would necessitate that he should withhold his assent from any one of such bills, or reserve the same for the consideration of the Imperial government.^x If the governor should not be satisfied as to his duty upon receiving a written report from the colonial law officers—which should be made, not in their capacity of political advisers, but as the authorised exponents of the law—certifying that no legal impediment exists to his giving the sanction of the Crown to the bills presented to him, he is at liberty, in any matter which is not of purely local concern, to take further counsel from the attorney and solicitor-general of England, by whom the Crown itself must ultimately be advised, in all doubtful cases of constitutional practice.^y

^w Case of the Canadian Copyright Act, Hans. D. v. 225, p. 426. Act 38 & 39 Vic. c. 53. And see *post*, pp. 171, 180.

^x See Vic. Leg. Assem. Pap. 1862-63, A. Nos. 26, 27, 28.

^y New South Wales Leg. Assem. Votes and Proc. 1859-60, v. 3, p. 911.

Mr. Nowell, in his 'History of Relations between the Two Houses of Parliament in Tasmania and South Australia,' takes exception to the author's conclusions, on this point, in reference to a dispute in New Zealand in 1872, between both houses of parliament, which was referred to the law officers of the Crown for their opinion; and claims that '(1) the Crown law officers are not necessarily versed in constitutional law, which is a distinct branch; (2) it was going outside the law, and handing over the privileges of parliament to an unrecognised tribunal.'^a—ED.

Author's
view
criticised.

But if the question as to the legality, of which the governor is desirous of being assured, be one of purely local concern, it would not be regular for the governor to take the formal and official advice of other judicial or legal authorities than those who occupy in the colony the position of Crown law officers. As a general rule, a governor would be justified in accepting and acting upon statements of such functionaries, in local matters. Though if his own individual judgment does not coincide with their interpretation of the law, his responsibility to the Crown may require him to delay acting on the advice of his ministers. But whatever steps he may think fit to take upon such a grave emergency, and from whatever materials his opinion may be formed, he is individually responsible for his conduct, and cannot shelter himself behind advice obtained from outside his ministry.^a

Advice of
colonial
Crown law
officers.

And here it may be well to state the rules which have been laid down by the Imperial government in respect to applications from a colony for the opinion of the law officers of the Crown in England, upon any important question of law which has arisen in the administration of the colony, especially questions of a legal or constitutional nature, affecting the exercise of

Of Imperial
Crown
law officers;

Ib. 1872-73, v. 1, p. 527. Com. Pap. 1890.

1878, v. 56, p. 761. Queensland Gold Fields Act of 1876, see *post*, p. 187.

^a Nowell, p. 83, n. 8^v Tasmania,

^a Secretary Sir M. Hicks-Beach to Governor Bowen, July 5, 1878. Com. Pap. 1878, v. 56, p. 905. And see *ante*, p. 8.

the royal prerogative, or the relative and appropriate rights of either branch of the legislature therein.

Advice of
Crown
law offi-
cers, how
taken ;

If in any case a colonial government or legislature desire to obtain the opinion of the English law officers on any question of this description, it is necessary that the secretary of state should be furnished with a detailed statement, explaining precisely what doubts have arisen, and under what circumstances ; enumerating the instruments or laws bearing on these doubts (of which complete copies should in all cases be annexed), setting forth *verbatim* the particular provisions of the same which appear relevant to the matter in hand, and in conclusion stating explicitly the particular questions to which answers are desired. All papers for the consideration of the attorney-general and solicitor-general should be sent in duplicate.^b

on
whose
behalf ;

The opinion of her Majesty's law advisers is occasionally obtained for the guidance of the governor, in the exercise of his personal discretion ; and not unfrequently similar advice is requested by her Majesty's government on the application of a colonial ministry, who are prepared to guide themselves by the advice which they might receive. But the Queen's ministers have never undertaken to obtain the official opinions of the attorney and solicitor-generals for an assembly or association of private gentlemen, however respectable. 'It would be peculiarly inconsistent for her Majesty's advisers in this country to call for such an opinion with the apparent object of guiding an opposition to the responsible advisers of her Majesty's representative in' any colony of the British Crown.^c

In 1867, Sir George Grey, leader of the opposition in the New Zealand house of representatives, applied for the opinion of the

^b Col. Reg. 1892, sec. 405.

Queensland Assem. Votes, 2nd Sess.

^c Secretary of state for the colonies, despatch of Oct. 22, 1867 ;

1867, v. 1. p. 663.

law officers of the Crown in England in reference to a ministerial measure for the abolition of the provincial governments, then pending in the colonial legislature, and which he was desirous of defeating. Sir G. Grey was especially anxious to know whether, in the opinion of these eminent legal functionaries, the Imperial parliament had or had not conferred upon the general assembly of New Zealand, by the Constitution Act, the power of abolishing the provinces without their consent. But the secretary of state had previously announced that her Majesty would not be advised to exercise her power of disallowing the act for the abolition of provinces; and no response was made to Sir George Grey's application.^d

when improperly sought.

Whenever bills are tendered to the governor of a colony for the purpose of receiving the royal assent, he is bound to exercise his discretion in regard to the same; and to determine, upon his own responsibility as an Imperial officer, unfettered by any consideration of the advice which he has received from his own ministers upon the subject, the course he ought to pursue in respect to such bills: whether to grant, or to withhold, the royal assent, or to reserve any particular bills for the signification of the royal pleasure thereon.

Governor's discretion in assenting to bills.

On November 17, 1857, the governor of Victoria, by message to the legislative assembly, recommended certain alterations in a bill then pending before the local parliament concerning oaths of qualification for office, which was intended to place persons of all religious denominations on an equality in this respect. By the 36th section of the Imperial act establishing the constitution of Victoria, the governor was authorised to propose such amendments to bills; and the house was required to take the same into consideration. But it happened that the bill had passed the assembly before this message from the governor was presented, and the legislative council agreed to the bill without amendment; whereupon, at the close of the session, on November 24, the governor declared that he withheld the royal assent to this bill. Next session, the bill was again brought in, passed, and assented to. The governor, in his speech proroguing parliament, adverted to this bill in terms of commendation, which warrants the inference that, upon its reintroduction, it had been

Precedents.

^d New Zealand Gazette, 1878, pp. 918, 919; New Zealand Pap. 1878, A. 1, pp. 24, 25.

Precedents.

divested of the provisions to which the governor had taken exception.^e

On June 4, 1858, the governor of the same colony withheld the royal assent from a bill 'to shorten the duration of the legislative assembly.' In his speech at the prorogation, which immediately followed, his excellency stated that he had refused to sanction this bill because he had been informed that it had not received the concurrence of 'a majority of the whole House,' and being advised that such a majority was required by the Constitution Act to validate such enactments, he had preferred to dispose of the bill at once, by his veto, in order that it might be again submitted to parliament in the following session, instead of reserving it for Imperial consideration, which, under any circumstances, he must have done, and thereby occasioned additional delay.^f

In a despatch addressed by Mr. Secretary Cardwell to the governor of Victoria, on January 24, 1865, in reference to a bill to authorise certain proceedings against customs officers, to which the royal assent had been given by the governor in the preceding session, he expressed his opinion that owing to obvious irregularities in this enactment, and especially to its being 'repugnant' to Imperial legislation, the governor ought to have withheld the royal assent from it. Even now its disallowance would have ensued were it not that, being expressly of temporary duration, the order of disallowance could scarcely arrive in the colony before it would have expired; but the governor was expressly enjoined on no account to assent to its revival or continuance. This despatch was immediately communicated to the local assembly.^g

It is incumbent upon the governor to transmit to the secretary of state for the colonies all laws assented to by him in the name of the sovereign, or reserved for the consideration of the Crown; accompanied, whenever it may seem to him to be necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such laws for the final determination thereon of the Queen in council.^h

^e Vic. Leg. Assem. Jour. 1857 and 1858, *in loco*.

^f *Ib.* 1858, *in loco*.

^g *Ib.* 1864-65, App. C. No. 50.

^h The colonial secretary (Earl Grey), Hans. D. v. 105, p. 470. British North America Act, 1867,

sec. 55. Royal Instructions to Governors. Whenever any parties who may consider themselves aggrieved by an act passed by a colonial legislature forward to the governor, for transmission to the sovereign, through the secretary of state, me-

For, although a governor as representing the Crown is empowered to give the royal assent to bills, this act is not final and conclusive; the Crown itself having, in point of fact, a second veto. All statutes assented to by the governor of a colony go into force immediately, unless they contain a clause suspending their operation until the issue of a proclamation of approval by the Queen in council,ⁱ or some other specific provision to the contrary; but the governor is required to transmit a copy thereof to the secretary of state for the colonies; and the Queen in council may, within two years after the receipt of the same, disallow any such act.^j

Second
veto of
the
Crown.

All colonial enactments are submitted to the scrutiny of counsel by the colonial department, and if they relate to commercial questions are referred to the consideration of the board of trade,^k and when necessary to the law officers of the Crown to ascertain their legality, and to determine whether they contain any provision which interferes with the exercise of any prerogative of the Crown,^l or which is 'repugnant' to the law of England. Any law to which objection could be taken on the ground of repugnancy is, to the extent wherein it is so repugnant to Imperial legislation, 'absolutely void and inoperative,'^m and should be formally disallowed by the

Revision
of colonial
bills by
Imperial
govern-
ment.

Validity Act
1865.

memorials for the disallowance of the act, the governor should furnish his ministers with copies of such representations or memorials, that they may append to the same whatever observations they may think fit. Case of the act suspending a grant to King's College; New Brunswick Assem. Jour. 1859, pp. 111, 202.

ⁱ See *ante*, p. 164. As in the case of the Canada Currency Acts, passed in 1851 and in 1853; and of the Canadian Copyright Act of 31 Vic. c. 56.

^j Clark, Colonial Law, p. 46; 31 Geo. III. c. 31, sec. 31; B. N.

America Act, 1867, sec. 56; S. Africa Union Act, 1877, sec. 26.

^k Todd, Parl. Govt. v. 2, pp. 525, 663, new ed. pp. 645, 790.

^l See Com. Pap. 1864, v. 40, pp. 697, 698.

^m 7 & 8 Will. III. c. 22, sec. 9; 3 & 4 Will. IV. c. 59, sec. 56; 28 & 29 Vic. c. 63, secs. 2-4. As to what constitutes 'repugnancy,' and the method of determining the same, see Law Mag. (1854), N. S. v. 20, p. 1. La Revue Critique, &c., du Canada, Janvier, 1872, p. 51. Hans. D. v. 225, pp. 282, 426.

Imperial
revision of
colonial
bills.

Crown. Doubts in such cases can only be removed by an Act of Parliament.ⁿ

It is also the duty of the law advisers of the colonial office to ascertain whether colonial laws have been framed so as to give adequate and complete effect to the intentions of the legislature.

In conformity with ancient usage, the assent of the Crown to colonial acts, or its disallowance of the same, is signified by the approval by her Majesty in council of reports advising the course to be pursued in particular cases. These reports nominally proceed, as of old, from the committee of council for trade and plantations (now called the board of trade), but they actually emanate from the colonial office. No colonial act can be disallowed, except upon the issue of an order of the Queen in council. Otherwise, it is customary to notify the governor that the acts forwarded by him will be 'left to their operation;' or, 'that her Majesty will not be advised to exercise her power of disallowance with respect to' the same.^o

Sometimes—when objections are entertained by the Imperial government to particular laws, passed by a local parliament, and reserved by the governor—the secretary of state for the colonies refrains from submitting the act to the Crown; not with the intention of defeating the deliberate wish of the legislature, but in order that the question may be left open for reconsideration at a future session.^p

The constitutional practice in regard to Imperial control over bills passed by colonial legislatures, and the

ⁿ See 26 & 27 Vic. c. 84.

^o First Report, West Indies Legal Commission; Com. Pap. 1825, v. 15, p. 233; Earl Grey, Hans. D. v. 106, p. 1120; *ib.* v. 122, pp. 1167, 1288. His paper in Nineteenth Cent., v. 5, p. 953;

Canada Sess. Pap. 1870, No. 39.

^p Despatch to governor of Victoria of Jan. 26, 1861, on Abolition of Pensions Act, Vic. Leg. Assem. Pap. 1860-61, No. 36; despatch on Lien on Crops Act, *ib.* 1862-63, A. No. 25.

circumstances under which that control is now exercised, in the case of self-governing colonies, will be further exemplified by a series of illustrative precedents.

Imperial supervision of colonial enactments.

These precedents, it should be observed, are principally taken from the political annals of Canada, as affording a wider and more instructive field of inquiry into the practical working of Imperial supervision over colonial legislation than is obtainable from any other quarter. For the experiment of incorporating the principle of 'responsible government' into the political institutions of a colony was first applied to Canada, before it was introduced elsewhere. And it is also important to notice the continued exercise of Imperial ascendancy over legislation in Canada, when her boundaries were enlarged, her political importance increased, and her right to the fullest measure of political freedom consistent with the supreme authority of the empire was frankly acknowledged by the mother country, upon her elevation into the rank of a dominion with subordinate provinces subject to her rule. We will note, first, Canadian practice, from the time of the union between Upper and Lower Canada, and the consequent introduction of local self-government into the united province in 1841, up to the period of the confederation of the British North American colonies in 1867.

In Canada before confederation.

For a return of the titles and dates of bills passed by the legislatures of Canada, Nova Scotia, New Brunswick, Newfoundland, and Prince Edward Island since 1836, and up to 1864, which were reserved—by the governor, or by the operation of a suspending clause in the particular acts—for reference to the Imperial government, specifying those to which the royal assent was ultimately refused, with extracts from despatches assigning reasons for the same, see Commons Papers, 1864, vol. xl. p. 665. Within this period no less than three hundred and forty-one bills were reserved by the governors of these British North American colonies, or suspended in their operation, until her Majesty's pleasure should be made known; to forty-seven of which bills the royal assent was,

Reserved
bills in
Canada.

for various reasons of law or of public policy, afterwards refused. Most of these cases, however, occurred prior to the concession of 'responsible government;' since then the number of bills reserved has been considerably reduced, and gradually lessened to a minimum. (*Ibid.* p. 709.)^a

At the close of the first session of the parliament of United Canada—on Sept. 18, 1841—no less than fifteen bills were reserved for the signification of the royal pleasure thereon. But all these bills afterwards received the royal assent, with the exception of a bill to provide for the freedom of elections. For some reason, which is not on record, the assent of the Crown was withholden from this measure. In the following session, a new bill on the subject was introduced, which was passed and assented to by the governor-general.

In 1842 and 1843, and also in subsequent sessions up to 1878, various Canadian bills were reserved for the consideration of her Majesty's government. But this course was necessitated, in regard to certain descriptions of measures, by reason of their affecting the prerogative of the Crown, or being of a character that, under the royal instructions, rendered such a proceeding imperative. It is not requisite, therefore, to make special reference to bills reserved under these circumstances, as, in most instances, they afterwards received the royal assent. It will suffice to point out the bills which failed to receive the assent of the Crown; or which, notwithstanding that they had received the same through the governor-general, were afterwards disallowed by the Queen in council.

Secret so-
cieties
bill.

In 1843, Sir Charles Metcalfe being governor-general, and Messrs. Lafontaine and Baldwin leaders of the provincial administration, they obtained his excellency's consent to submit to parlia-

^a For number of provincial bills disallowed by the federal government in Canada, see *post*, p. 530.

ment a bill for the discouragement of secret societies. But the measure which they introduced included several clauses to which the governor repeatedly took exception, on the ground that they were arbitrary, oppressive, and unconstitutional. Nevertheless, the bill passed through both houses of the legislature. Whereupon the governor declared his intention of reserving it for the consideration of the Imperial government. Ministers objected to this proceeding. They also differed with the governor in regard to the mode of exercising the patronage of the Crown in appointments to office. They accordingly resigned, one only of their number remaining in office. At this juncture, parliament was prorogued; the secret societies bill, with some others of minor importance, being reserved for the signification of the Queen's pleasure thereon. A new administration was then formed, and a dissolution of parliament ensued. In the new assembly the incoming ministers were sustained. The royal assent was withheld from the secret societies bill, because 'the Queen cannot be advised to concur in an enactment placing any class of her Majesty's subjects beyond the protection of the law, and depriving them, without a previous conviction for crime, of the privileges to which all British subjects have a common title.' The governor-general was also notified that his conduct was approved by her Majesty's government.^r

Precedents of reserved bills in Canada.

In 1844 a reserved bill, for better securing the independence of the legislative council, was not assented to because the law officers of the Crown advised that it contained provisions that were 'repugnant' to the Imperial act 3 & 4 Vic. c. 35.^s In the same year, a bill to explain and amend an act of the previous session, vesting certain property in the officers of her Majesty's ordnance, was reserved, and not afterwards assented to, for reasons that were not made known to parliament.^t But in 1846 another act on this subject was passed and assented to.

Legislative council bill.

Ordnance bill.

In 1846 a reserved bill, to divorce one Mr. Harris from his wife, was refused the royal assent, on the report of the law officers of the Crown that, whereas the parties were not domiciled in Canada at the time of the passing of the act, the courts of law would not consider the act adequate to effect a valid divorce, even if it were to receive the sanction of the Crown.^u

Divorce bill.

In the same year the royal assent was withheld from a reserved

^r Canada Leg. Assem. Jour. 1843, pp. 181-210, 1844-45, p. 66; Com. Pap. 1864, v. 40, p. 689; Hans. D. v. 75, pp. 39-72. For Imperial legislation concerning secret societies, see Stephen Hist. Crim. Law

of England, ed. 1883, v. 2, p. 294.

^s Canada Leg. Assem. Jour. 1844-45, p. 65.

^t *Ib.* 1846, p. 81.

^u *Ib.* p. 29.

Precedents of reserved bills in Canada.

bill to authorise the creditor of a public officer to attach a part of his official salary in satisfaction of a judgment against him, because this bill was liable to grave objections on grounds of public policy, and because no similar law exists in England.^v

Bytown incorporation.

By order of the Queen in council, dated July 18, 1849, a Canadian act, passed and assented to in 1847, for the incorporation of the town of Bytown, was disallowed.^w Meanwhile, however, the Canadian parliament in 1849 had passed an act to repeal the act aforesaid from January 1, 1850, and to substitute other provisions for the incorporation of Bytown. The grounds of objection taken by the Imperial government to the act of 1847 do not appear, but it is evident that they were removed in the later act of 1849, inasmuch as that statute was allowed to go into operation.^x

Currency bills.

By order of the Queen in council, dated April 14, 1851, a Canadian act, passed and assented to in 1850, in relation to the currency, was disallowed, for various reasons: (1) because the governor-general, by assenting to this act, and not referring it for the special consideration of the Imperial government, acted in contravention of the royal instructions; (2) because the act proposed to confer upon the governor-general the right of coining—a prerogative reserved by constitutional law to the sovereign; (3) because of the clause contained therein to alter the current rates of certain foreign coins—which, being enacted without the previous assent of her Majesty in council, was an interference with Imperial control over the value of current money in circulation throughout the realm. Previous to the formal disallowance of this act, much correspondence took place respecting it between the colonial and Imperial governments.^y Subsequently, in the years 1851 and 1853, new currency acts were passed by the Canadian parliament; but they were framed with due regard to the royal prerogative, and contained clauses to postpone their enforcement until after the issue of royal proclamations to declare the time when they should go into operation. These acts, moreover, were carefully considered between the respective governments, and the correspondence thereon communicated to the Canadian parliament.^z And although, by the British North America Act of 1867, the Imperial parliament has specially empowered the parliament of Canada to exercise 'exclusive legislative authority' in relation to 'currency and coinage,' the acts passed in Canada upon the subject of the currency in 1868 and in 1871 expressly conserve the prerogative of the Crown in the matter of coinage, and

^v Canada Leg. Assem. Jour. Vic. c. 82.
1846, p. 43.

^w *Ib.* 1850, p. 7.

^x See also Canada Act, 13 & 14

^y Canada Leg. Assem. Jour. 1851,
App. Y.Y.

^z *Ib.* 1852-53, App. P.

authorise her Majesty to affix by proclamation from time to time the rates at which coins in circulation in Canada, or struck off by order of her Majesty for use in Canada, shall pass current.^a

Precedents of reserved bills in Canada.

By order of the Queen in council, dated September 23, 1859, a Canadian act, passed and assented to in that year, to impose a duty on vessels admitted to registry and to the Canadian coasting trade, and belonging to countries not admitting Canadian vessels to similar privileges, was disallowed.^b

Shipping bills.

By order of the Queen in council, dated January 6, 1862, a Canadian act, passed and assented to in 1861, to give jurisdiction to Canadian magistrates, in respect of certain offences committed in New Brunswick by persons afterwards escaping to Canada, was disallowed, as being in excess of the jurisdiction belonging to the Canadian parliament, and only to be properly effected by Imperial legislation; or by an arrangement, in the nature of an agreement of extradition between the two provinces, to be carried into effect by acts of the two provincial legislatures.^c

Extra-territorial legislation.

Let us now briefly notice the instances wherein bills passed by the parliament of the dominion of Canada, after its establishment under the British North America Act of 1867, have been disallowed by the Crown.

Control of Crown over Canadian legislation, since confederation.

On May 22, 1868, at the close of the first session of parliament of the new dominion of Canada, an act passed by the senate and house of commons 'to fix the salary of the governor-general' was reserved for the consideration of her Majesty's pleasure thereon. It was proposed, by this act, to reduce the salary of the governor-general from 10,000*l.*, at which rate it had been fixed by the Imperial act of union in 1867 (subject to alteration by the parliament of Canada), to 6,500*l.*

Governor-general's salary bill.

But on July 30, 1868, the secretary of state for the colonies notified Lord Monck (the governor-general) that while it was 'with reluctance, and only on serious occasions, that the Queen's govern-

^a Canada Acts, 31 Vic. c. 45; 34 Vic. c. 4; and see the Queen's proclamation, dated Dec. 9, 1876, in regard to bronze coins for circulation in Canada, prefixed to the Canada Stats. 1877, p. 61. Also Canada Sess. Pap. 1870, No. 40. And see despatch Feb. 27, 1879, regarding supply of new coinage, enjoining governors to keep it in proper condition by withdrawal of worn coins. S. Aust. Parl. Proc. 1879, No. 66.

^b Canada Leg. Assem. Jour. 1860, p. 6.

^c Canada Leg. Assem. Jour. 1862, p. 101. The law officers of the Crown gave an opinion in 1855, in reference to British Guiana: 'We conceive that the colonial legislature cannot legally exercise its jurisdiction beyond its territorial limits—three miles from the shore—or, at the utmost, can only do this over persons domiciled in the colony who may offend against its ordinances even beyond those limits, but not over other persons.' (Forsyth, Constitutional Cases, p. 24.)

Precedents of reserved bills in Canada.

ment can advise her Majesty to withhold the royal sanction from a bill which has passed two branches of the Canadian parliament,' yet that a regard for the interests of Canada and a well-founded apprehension that a reduction in the salary of the governor which would place the office, as far as salary is a standard of recognition, in the third class among colonial governments, obliged her Majesty's government to advise that this bill should not be permitted to become law.^d In accordance with the opinions entertained by the Imperial government on this subject, and with the right to legislate thereon which was expressly conferred upon the parliament of Canada by the 105th section of the British North America Act, the dominion parliament in 1869 re-enacted, by their own authority, the clause of the Imperial statute which fixed the salary of the governor-general at 10,000*l*. sterling, equal to \$48,666.63; the same to be payable out of the consolidated revenue of Canada. This act was necessarily reserved, under the royal instructions; but it received the assent of her Majesty in council on August 7, 1869. Since then no further attempt has been made to reduce the salary of the governor-general.

Criminal law statutes.

On December 17, 1869, the secretary of state for the colonies notified the governor-general of Canada, in regard to certain acts passed by the dominion parliament in the previous session of parliament, that her Majesty would not be advised to exercise her power of disallowance with respect thereto; but that he observed that the third section of 'an act respecting perjury' assumed to affix a criminal character to acts committed beyond the limits of the dominion. 'As such a provision is beyond the legislative power of the Canadian parliament,' the colonial secretary requested the governor-general to bring this point to the notice of his ministers, with a view to the amendment of the act in this particular.^e Accordingly, in the ensuing session of the dominion parliament an act was passed to correct this error.^f

Extra-territorial jurisdiction.

Provincial governments establishment.

On May 12, 1870, an act passed by the parliament of the dominion of Canada, 'to establish and provide for the government of the province of Manitoba,' was assented to by the governor-general in the Queen's name. While this act was under consideration in parliament, doubts were expressed as to the competency of the dominion parliament, under the British North America Act, 1867, to establish provincial governments in territories admitted, or which may hereafter be admitted, into the dominion, and to provide for the representation of such provinces in the senate and the

^d Canada Sess. Pap. 1869, No. 73. In 1862, a reserved bill to reduce the salary of the governor of

assent. Vic. Parl. 1862, No. 30.

Victoria was refused the royal

^e Canada Sess. Pap. 1870, No. 39.

^f Act 33 Vic. c. 26.

house of commons of the dominion. Accordingly, upon a report made to the privy council of Canada by the minister of justice upon this subject, and approved by the governor-general, application was made to the Imperial government to submit a measure to the Imperial parliament, at its next session, for the purpose of quieting these doubts, and for preventing the necessity of repeated applications to the Imperial parliament for additional powers to enable the dominion parliament to legislate for the admission of new provinces into the dominion, upon similar terms and conditions as apply to the provinces already forming part of the same ; and also for the alteration of the boundaries of existing provinces, with the consent of the local government.

Precedents of reserved bills in Canada.

In compliance with the wishes of the Canadian government, the secretary of state for the colonies, on January 26, 1871, transmitted to the governor-general a draft-bill for effecting the purposes above mentioned ; which, being approved in Canada, was afterwards enacted by the Imperial parliament.^g

On May 3, 1873, the governor-general of Canada (the Earl of Dufferin) transmitted to her Majesty's secretary of state for the colonies a certified copy of a bill 'to provide for the examination of witnesses on oath by committees of the senate and house of commons in certain cases,' which had passed both houses of the Canadian parliament and received the royal assent through the governor-general. In his despatch, accompanying this bill, Lord Dufferin explained the nature and necessity for the measure, and the reasons which had induced him to assent to it, notwithstanding the fact that doubts had been expressed whether, on technical grounds, this bill was within the competency or jurisdiction of the Canadian parliament. He inclosed a memorandum from the minister of justice (Sir John A. Macdonald), giving expression to these doubts and desiring that they might be considered by her Majesty's government.

Oaths bill.

On June 30, 1873, the secretary of state for the colonies notified the governor-general that, upon the advice of the law officers of the Crown, her Majesty had agreed to an order in council, disallowing the act in question, upon the ground that it was *ultra vires*, as being contrary to the express terms of the eighteenth section of the British North America Act. He also pointed out that the Act 31 Vic. c. 24, passed by the Canadian parliament in 1868 for the purpose of conferring upon the senate the power of administering oaths to witnesses at their bar—though it appears to have escaped observation, and was not disallowed—was nevertheless 'void and inopera-

^g Canada Sess. Pap. 1871, No. 20, pp. 136-141 ; Imp. Act, 34 & 35 Vic. c. 28.

Precedents of reserved bills in Canada.

tive as being repugnant to the provisions of the British North America Act, and cannot be legally acted upon.'^b

By an act of the Imperial parliament, passed in 1875, the eighteenth section of the British North America Act, aforesaid, was repealed, and a new provision substituted, under which it was declared to be competent to the parliament of Canada to pass any act to define the privileges, immunities, and powers of either house, and of the members thereof, respectively; but so that the same shall not exceed those held and exercised by the Imperial House of Commons at the time of the passing of such act. This statute, likewise, gave validity to the Canadian act of 1868, which was declared to have been invalid, because of its repugnancy to the Imperial act of 1867.ⁱ

Copyright legislation.

In the session of the parliament of Canada held in 1872, a bill was passed, 'to amend the act respecting copyrights,' which was reserved for the signification of her Majesty's pleasure. On May 16, 1874, the governor-general transmitted to the secretary of state for the colonies copies of resolutions, adopted by the Senate and House of Commons, urging that the royal assent should be given to this bill; and representing that the two years, within which (under the fifty-seventh section of the British North America Act, 1867) it would be competent for the assent of the Queen in council to be signified to the same, would expire on June 14 next. In his reply, dated June 15, 1874, the colonial secretary stated that he had been unable to advise her Majesty to assent to this bill, because certain provisions, contained therein, are in conflict with imperial legislation in regard to copyright. Moreover, the validity of the bill would not have been established, even if her Majesty had been pleased to assent to it; inasmuch as being 'repugnant' to an Imperial act extending to the colony, it was by the second section of the colonial laws validity act of 1865, absolutely void and inoperative.^j

In 1875 another copyright act was passed by the Canadian parliament and reserved for Imperial consideration. In the same year an Imperial act was passed empowering the Queen to assent to this Canadian statute, notwithstanding its presumed repugnance to Imperial legislation and to an order in council issued in 1868. It gave authority to her Majesty to assent to the bill, but it prohibited the im-

^b Canada Com. Jour. Oct. 23, 1873, pp. 5-12; Com. Pap. 1874, v. 45, pp. 3-9.

ⁱ Imp. Act 38 and 39 Vic. c. 38; Canada Sess. Pap. 1876, No. 45. Accordingly, in 1876, the oaths bill, disallowed merely upon technical

grounds, was re-enacted by the Canadian parliament. (Can. Stats. 39 Vict. c. 7). For a similar act, for the examination of witnesses by parliament, upon oath, see New South Wales Stat. 45 Vic. c. 5.

^j Com. Sess. Pap. 1875, No. 28.

portation into the United Kingdom of colonial reprints. It accordingly became law. In 1885 an international copyright convention was held at Berne, Switzerland, and a draft of the convention was agreed to for giving to authors of literary and artistic works, first published in one of the countries, a like copyright in all the other countries that had joined the conference.^k Accordingly, an Imperial act was passed in 1886 to carry the Berne convention into effect in her Majesty's dominions.^l

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Copyright legislation.

In 1889 a Canadian act, further amending the copyright law, was passed, but held not to go into force until proclaimed by the governor-general, that it might first be submitted for the concurrence of her Majesty's government. In the main it sought the same powers to legislate in the dominion as did that of the bill of 1872, before referred to. In a report by the Canadian privy council, to the governor-general, setting forth the object and purpose of this bill, it is stated that the copyright law in force in Canada (of which the act of last session was an amendment), irrespective of the international copyright act of 1886, which gives effect to the Berne convention, consists, as has been intimated, partly of Imperial and partly of Canadian legislation.

Under it every work copyrighted in Great Britain had copyright protection without the requirement of publication in Canada. Under the protection of this system United States authors secure copyright in Great Britain and her possessions by publishing in England (sometimes by publishing a limited edition, not intended to supply the market, and not sufficient thereof), and thus secure control of the Canadian market, while a Canadian cannot obtain such copyright privileges in the United States. . . . 'By the legislation of last session it is proposed that the persons having copyright under Imperial legislation or under any treaty arrangement with Great Britain, may preserve the exclusive right as to Canada by publishing or republishing in this country within a certain time, and that if he does not so publish or republish, his copyright shall still avail him, to the extent of enabling him to collect a royalty on all republications made in Canada by any other person.'^m The Copyright Association of England asked that her Majesty be advised to withhold the royal assent to this act, and the colonial secretary replied that it would be referred to the law officers of the Crown.ⁿ Subsequently the Copyright Committee of the Society of Authors, in reply to a communication from the colonial secretary directing that they con-

^k Articles of convention, Com. Copyright Act, 1889; Can. Sess. Pap. 1887, v. 91, p. 307. Pap. 1890, No. 35, p. 5.

^l 49 and 50 Vic. c. 33.

ⁿ *Ib.* pp. 1-4.

^m Report of Privy Council on

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Copyright legislation.

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sider the questions raised by Sir John Thompson in his report (for full text of report see Sessional Papers, No. 81, 1892) to Lord Knutsford, of July 14, 1890, upon the act, confined themselves to suggesting improvements in the enforcement of the act, protecting the authors' interests, and did not, as previously, ask for its disallowance.

In reply to a letter from the minister of justice, dated December 15, 1890, pressing upon the home government the necessity of granting legislation to set at rest the questions involved in copyright in Canada, the colonial secretary stated that it was considered desirable to delay reply till 'it was seen how the copyright question would be finally dealt with in the United States.'^o

In 1874, a bill was passed by both houses of the parliament of Canada, entitled, 'an act to regulate the construction and maintenance of marine electric telegraphs.' In conformity with the seventh paragraph of the royal instructions, and upon the advice of the minister of justice, his Excellency the governor-general reserved this bill for the signification of her Majesty's pleasure. The Anglo-American telegraph company had opposed the passage of the bill, but their objections to it had been overruled by the senate; and the privy council, while advising its reservation, out of deference to the royal instructions, and because it 'may possibly be considered to prejudice the interests and rights of property of her Majesty's subjects not residing in Canada,' expressed their conviction that the measure was calculated to be highly beneficial to Canadian interests, and also was in accordance with the established policy of the country. They therefore prayed that it might receive the royal assent at an early date.

Meanwhile, the Anglo-American telegraph company petitioned the governor-general in council that the bill might not be allowed to become law; but they were informed that, the bill being now in the hands of the Imperial authorities, the subject was no longer open for the consideration of the government of Canada.

Numerous representations were made to her Majesty's secretary of state for the colonies, both for and against the confirmation of this bill. But on October 29, 1874, he wrote to the governor-general, intimating that, while he entirely appreciated the reasons which induced the Canadian ministers to advise the reservation of the same, he felt that he could not properly assume the function of deciding between the conflicting views expressed in regard to the policy embodied in this measure. He had therefore decided to tender no advice to her Majesty respecting it.

He added that 'it seems to me to be clearly within the com-

^o Canada Sess. Pap. 1892, No. 81, p. 20.

petency of the dominion government and parliament to legislate' upon this subject, 'without any interference on the part of the government of this country.' It being a local question, 'involving no points in respect of which it would appear necessary that Imperial interests should be guarded, or the relations of the dominion with other colonial or foreign governments controlled.' 'It is obvious that if the intervention of her Majesty's government were liable to be invoked whenever Canadian legislation on local questions affect, or is alleged to affect, the property of absent persons, the measure of self-government conceded to the dominion might be reduced within very narrow limits. It is to the dominion government and legislature that persons concerned in the legislation of Canada on domestic subjects and its results must have recourse; and this government cannot attempt to decide upon the details of such legislation without incurring the risk of those complications which are consequent upon a confusion of authority.'

Precedents of reserved bills in Canada.

Marine telegraphs.

It having been decided by her Majesty's government to take no action with respect to this reserved bill, in order that, if thought desirable in Canada, a new bill might be introduced into the dominion parliament during the following session, the secretary of state for the colonies, in reply to a communication from the government of Newfoundland, in regard to certain rights presumed to accrue to parties under an act passed by the Newfoundland legislature, advised that those rights should be submitted to judicial determination by the supreme court of the colony. And that it would be of advantage for the government of Newfoundland to confer with the dominion government in relation to the best mode of settling what, if any, payments might be necessary for satisfying such rights.^p

In the following session of the dominion parliament, a new bill to regulate the construction and maintenance of marine electric telegraphs was introduced; and after undergoing considerable modification in both houses, for the purpose of meeting the views of contending parties, it was passed and assented to by the governor-general.^q

The Imperial merchant shipping act of 1876 contains certain general provisions applicable to vessels trading with Canada. But the forty-fourth section of this act declares that the regulations in respect to deck cargoes shall not apply to ships engaged in the coasting-trade of any British possession, and that no part of the act shall apply to any vessel trading exclusively in colonial inland waters. In 1878, however, a bill was passed through the dominion

Merchant shipping act.

^p Canada Sess. Pap. 1875, No. 20.

^q Act 38 Vic. c. 26; and see Canada Sess. Pap. 1877, No. 119.

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Merchant shipping act.

parliament to repeal, 'as respects all ships while in the waters of Canada,' from and after the time which may be fixed for that purpose by a proclamation issued by her Majesty in council, the twenty-third section of the said statute, which regulates the space occupied by deck cargoes which shall be liable for tonnage dues. This act was not allowed by her Majesty's government, inasmuch as it claimed to legislate not merely for Canadian shipping, and for vessels specially exempted by the forty-fourth section above mentioned, from the operation of the Imperial act, but likewise for 'all ships' while in Canadian waters. Such a provision was obviously in excess of the powers of the Canadian parliament. In making known to the Canadian government their disapproval of this act, the Imperial board of trade suggested that another act might be passed on the subject, but limited in its operation to ships over which the dominion government could exercise control."

In the session of 1879 the Canada Parliament passed another act (42 Vic. c. 24) respecting the tonnage of ships, which was expressly limited to vessels amenable to Canadian law. (See also 43 Vic. c. 29, sec. 13.) Upon the same principle, the colonial secretary, in a despatch to the governor of New Zealand, dated May 3, 1878, whilst admitting that, 'so far as relates to communication with the shore and with the shipping in colonial waters, her Majesty's ships should be subject to local quarantine regulations in the same manner as merchant ships,' yet desired that instructions might be issued, by the government of the colony, to forbid the local authorities in any way to interfere with the internal management of her Majesty's ships, or with their freedom to proceed to sea whenever the officer in command may deem such course requisite."

Supreme court act.

Furthermore, upon the introduction into the Canadian parliament, in 1875, of a bill to create a supreme court for the dominion, it was the expressed intention of ministers to have prohibited any further appeals to her Majesty's privy council. They were notified, however, that the bill could not be sanctioned unless it preserved to the Crown its rights to hear the appeals of all British subjects who might desire to appeal in the ultimate resort to the Queen in council. Accordingly, a saving-clause to that effect was inserted in the bill, and it received the royal assent."

It will be seen by the table of reserved bills and disallowed acts (*ante*, p. 158), that, covering the period from the establishment of the dominion government in 1867 to 1890, the royal assent appears,

* Private information received from the Department of Marine and Fisheries, March, 1879.

* New Zealand Parl. Pap. 1878,

App. A. 2, p. 19.

* Lord Norton, in Nineteenth Cent., v. 6, p. 178; Canada Act, 38 Vic. c. 11, sec. 47.

formally, to have been withheld only in the case of one bill, and but one act has been disallowed.

We would now invite attention to various precedents that have arisen in the Australian colonies, which illustrate the extent of the control now and heretofore exercised by the Queen in council over legislation in that part of the empire.

In Australia.

In 1858 the governor of New South Wales informed her Majesty's secretary of state for the colonies that a bill, intituled an act to impose an assessment on runs, and to increase the rent of lands leased for pastoral purposes in the colony, had passed both houses, and had been tendered to him for his assent, on behalf of the Crown. On consulting the colonial law officers in regard to this bill, he had received from them two separate reports—one from the solicitor-general certifying to its legality, the other from the attorney-general disputing the same. Under these circumstances, the governor decided to act on his own judgment, and he gave the royal assent to the bill. But he deemed it to be his duty to report the case to the colonial secretary.

Precedents on Australian legislation.

Assessment on pastures.

In reply to this reference, Earl Carnarvon informed the governor that the Imperial government had decided, for certain reasons which he explained, to permit the act to remain in operation, notwithstanding its doubtful legality. If the act were illegal, it was open to any aggrieved person to seek for redress from its requirements by an action at law. Should the repugnance of the act to Imperial legislation be conclusively established by a decision of a competent court, it would be disallowed; provided that the time limited for such an exercise of the prerogative should not then have expired.^u

In 1866 a ministerial crisis occurred in Queensland. Owing to serious financial embarrassments in that colony, ministers had tendered to the governor (Sir G. F. Bowen) their advice that, in order to sustain the public credit, there should be an immediate issue of inconvertible paper currency, in the shape of legal tender notes, to an amount not exceeding two hundred thousand pounds.^v The governor demurred to this proposal, inasmuch as he was expressly forbidden, by the royal instructions—'which are a part of the constitutional law of the colony'—to assent to any bill of this nature, unless upon urgent necessity, as aforesaid.^w He distinctly

Paper currency.

^u New South Wales Leg. Assem. 1866, p. 952.

Votes, 1859-60, v. 3, p. 911.

^w See *ante*, p. 164.

^v Queensland, Leg. Assem. Jour.

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declared that in no event would he give the royal assent to any such bill. He suggested, however, another mode of meeting the financial difficulty—viz., by obtaining legislative sanction to the issue of treasury bills, coupled with the imposition of additional taxation; a course which had proved successful, under similar circumstances, in other colonies and in the mother country.

Ministers refused to entertain these suggestions, and adhered to their own plan. And they sought to persuade the governor that he would be amply warranted, in the emergency, in following their advice.

The governor, on his own part, was equally inflexible. He reminded his ministers that, in all purely colonial questions, he had invariably accepted the recommendations of his constitutional advisers, even when his individual opinion, in important cases, had differed from theirs; believing it to be his duty to give all just and lawful support to his ministers, together with the result of his own knowledge and experience, in local questions. But in this case, where Imperial interests were concerned, he felt that his duty to the Crown and to the colony alike required him to refuse his sanction to the proposed measure; more especially as he failed to perceive any 'urgent necessity' that would justify him in having recourse to such an extraordinary and questionable proceeding, until, at any rate, the ordinary measures of relief should have been tried in vain. Whereupon the Macalister administration tendered their resignations, which, however, the governor refused to receive.

But, with a view to conciliation, the governor intimated his willingness to waive the strict constitutional rule that, 'to all important acts by which the Crown becomes committed, the sanction of the sovereign (or of her representative) must be previously signified;' and to permit the introduction in parliament of their financial scheme, pending his communication thereupon with the secretary of state; reserving his final decision thereon until the measure should have passed both houses, and be presented to him for the royal assent.^x

Meanwhile, as much misapprehension prevailed as to the nature and extent of the impediment which was known to exist to the proposed legislation at this financial crisis, the governor consented, at the earnest request of the premier, to the immediate production of his correspondence with ministers in parliament; deprecating, however, the slightest desire to interfere with the privileges or influence the deliberations of parliament by such a step.^y

^x See further on this point, *post*,
p. 631.

^y Queensland Leg. Assem. Votes,
1866, pp. 437-447.

But, on the following day, ministers again tendered their resignations ; and his excellency reluctantly accepted them—being aware that they possessed the confidence of the assembly, in their general policy, and being of opinion that the point of difference, on a question to be determined on Imperial considerations, did not necessitate their retirement. The governor, however, had no difficulty in obtaining other advisers. A new ministry was at once formed, by Mr. R. G. Herbert, which proved acceptable to both houses.²

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The Herbert administration met the emergency by the immediate introduction of a bill authorising the issue of treasury bills, to the amount of three hundred thousand pounds, which sum was deemed to be sufficient to carry the colony through its commercial crisis. This bill passed both houses, and received the royal assent within four days.^a

Afterwards, certain of the colonists petitioned the Queen for Sir G. F. Bowen's recall, because of his action in this matter, and his alleged unconstitutional inducement of a change of ministry. This petition was transmitted, through the governor, to her Majesty. But the popular resentment against the governor speedily subsided ; and he continued to enjoy the respect and confidence of the people of Queensland, for the ability and energy he had displayed in the government of the colony, until his promotion, in December, 1867, to be governor of New Zealand.^b A formal answer was given to this petition, which was published in the 'Official Gazette' ; and, in a separate despatch, the colonial secretary (Lord Carnarvon) expressed his entire approval of the governor's conduct on this occasion.^c

In 1876, a bill was passed through both houses of the Queensland parliament, entitled 'a bill to amend "the goldfields act of 1874," so far as relates to Asiatic and African aliens,' under which an increased license-fee was authorised to be collected from such aliens with the view to discourage excessive immigration from China.

Chinese immigration into Queensland.

Whereupon the governor, Mr. (afterwards Sir W.) Cairns, requested the colonial attorney-general to furnish him with a special report upon this bill ; intimating whether, in his opinion, there was any objection to the governor giving the royal assent to it ; or whether, under the royal instructions, or pursuant to any existing law, his excellency should withhold his assent, or reserve the bill for the signification of the royal pleasure.

The attorney-general, in reply, stated that, in his opinion, the bill contained nothing which would necessitate that the royal assent

² Queensland Leg. Assem. Votes, 1866, p. 183 ; Votes of 1867, p. 81.

^a Leg. Assem. Votes, 1866, pp. 184-187 ; Votes of 1867, p. 83.

^b Leg. Assem. Votes, 1867, p. 37 ; Adderley, Colonial Policy, p. 37.

^c Leg. Assem. Votes, 1867, p. 83 ; and see *ante*, p. 129.

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should be withheld from it, or that it should be reserved for the consideration of the Crown. In support of this conclusion, he quoted several precedents.

Notwithstanding the respect which he entertained for the opinion of the attorney-general, Governor Cairns was still persuaded that it was his duty to reserve this bill for imperial consideration; inasmuch as he deemed it to be of an extraordinary nature, and as possibly involving a breach of international comity, by imposing restraints upon Chinese immigrating into Queensland, contrary to the principle which the British government imposed on China, by the treaty of Tien-Tsin, as regards the treatment of foreigners, by that nation, and especially at variance with the fifth article of the convention signed at Peking, on October 24, 1860. The exceptional and extraordinary amount of the license proposed to be imposed by this bill upon Chinese immigrants is apparent, from the fact that the fee for an ordinary miner's license was ten shillings, with a charge of four pounds for a business license; whereas this bill provided that all 'Asiatic or African aliens' should pay three pounds for a miner's license, and ten pounds for a business license. The governor, accordingly, notified the prime minister that he should reserve this bill for the signification of the royal pleasure thereon.

On their part, ministers were unanimously agreed that the bill was within the competency of the colonial legislature, and that the governor was not required to reserve it. In communicating this opinion to the governor, they observed that they felt it 'to be of the utmost importance that the authority of the colonial legislature to pass laws upon all subjects whatever which they may think necessary for the good government of the colony should be recognised and upheld, and that no other limit to that power should be admitted than that which is imposed by the royal instructions to the governor. They think that, to go beyond those instructions, or to allow the unusual character of proposed legislation not forbidden by them as a sufficient ground for not giving immediate effect to the wish of the legislature, would be of serious consequence to the independence and freedom of parliament.' They, therefore, advised that the governor should assent to this bill.

His excellency, however, decided that it was incumbent upon him to reserve the bill for the signification of the royal pleasure upon it. In transmitting it to her Majesty's secretary of state for the colonies, he recapitulated, in a despatch dated October 11, 1876, his reasons for so doing.

In reply, the Earl of Carnarvon (the colonial secretary), in a despatch dated March 27, 1877, expressed his approval of the

governor's conduct, and of the reasons which had actuated him. For these reasons, he added, as well as upon other grounds—although he was most unwilling even to appear to infringe upon the privileges of self-government enjoyed by the inhabitants of Queensland—he had been unable to advise the Queen that this bill should receive the royal assent in its present shape. He admitted that similar legislation had been agreed to by the colony of Victoria (in 1855, and later years, and consolidated in 1864, by the Act 27 Vic. No. 200), and by New South Wales (in 1861, &c., by the Acts 25 Vic. No. 3, and 31 Vic. No. 8), and that her Majesty had not been advised to disallow any of those acts, although at the time the colonial secretary had remonstrated, and declared the unquestionable fact 'that exceptional legislation, intended to exclude from any part of her Majesty's dominions the subjects of a state at peace with her Majesty, is highly objectionable in principle.' But, since then, these acts had been repealed, to the great satisfaction of her Majesty's government. Adverting to the contention of the local ministry that there should be no limit to the power of the colonial legislature to pass laws, other than that which is distinctly imposed by the royal instructions to the governor, Lord Carnarvon presumes that 'this apparently unqualified statement was to be taken as being made subject to the paramount authority of the Imperial parliament, and the power of disallowance expressly reserved to her Majesty by the constitutional act.' Not dissenting from the statement of ministers, as to the powers and functions of the Queensland parliament, so far as relates to matters of purely internal concern—with which the local parliament is competent to deal—the secretary of state was nevertheless of opinion that Governor Cairns 'had no alternative, under the eleventh section of his instructions, but to reserve the bill ; inasmuch as it is one of an extraordinary nature, whereby the rights of her Majesty's subjects not residing in the colony may be prejudiced.'

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Consequent upon the disallowance of this bill, the premier of the Queensland administration addressed a circular letter, dated April 20, 1877, to the agent-general of the colony in England (for the information of Lord Carnarvon) and to the chief secretaries of the sister colonies in Australasia, urging the necessity that the colony of Queensland should be at liberty to encourage or to discourage, at her unfettered discretion, immigration from China ; and that the existence of international obligations between Great Britain and the empire of China should not be made a pretext for forcing upon Queensland a Chinese population, against her wishes or interests. This circular invited the several Australasian governments to a joint agreement with Queensland in some principles of action which

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would sustain the colony in the exercise of its rights as a self-governing community.

In reply to this communication, the colonial secretary of New South Wales wrote to the colonial secretary of Queensland, expressing sympathy in any well-devised scheme to arrest the excessive immigration of Asiatic and African aliens into the northern part of Australia, but submitting that the aforesaid 'despatch from the secretary of state does not appear to have been inspired by any spirit opposed to the constitutional rights of Queensland. Being integral parts of the empire, the colonies must clearly be subject to the obligations of the empire ; and it is no more than the duty of the Imperial authorities to guard against local acts of legislation conflicting with the honour of the Crown. In the present instance there does not appear to be any just ground for anticipating that her Majesty will be finally advised to withhold assent from any measure for the protection of the people of Queensland which respects Imperial obligations, and does not exceed the necessities of the case.' However, on July 4, 1877, the legislative assembly of New South Wales passed an address to the governor, expressing their sympathy with Queensland, in its endeavours to obtain protection from the dangers of excessive Chinese immigration, and their desire that the administration should represent to the Imperial government the expediency of endeavouring to obtain from the Chinese government such a modification of existing treaty stipulations as would enable restrictions to be placed upon the present exceedingly undesirable flood of Chinese people coming into Australia.

The chief secretary of Victoria (Mr. Graham Berry), in reply to the circular from Queensland, wrote to express the entire sympathy and concurrence of the Victoria government in the position taken by Queensland upon this question.

But none of the other Australian governments appear to have coincided with the Queensland administration in the opinions they expressed in regard to the exercise of the royal prerogative by the governor upon this occasion.^d

Her Majesty's secretary of state for the colonies having, in his despatch of March 27, 1877, above quoted, expressed his willingness to co-operate with the administration of Queensland in dealing with the very difficult question of Chinese immigration in any way that might be consistent with equity and sound policy, a new bill to amend the gold fields act of 1874, so far as related to Asiatic and

^d Queensland Parl. Papers, 213-221. And see New Zealand 1876-78. New South Wales Legislative Council Jours. 1876-77, pp. Parl. Deb. v. 33, p. 106.

African aliens, was passed by the Queensland legislature in 1877. This act was free from the most objectionable features in the act which had been disallowed. Chinese immigration into Australia.

In the same session the Queensland legislature passed another act 'to regulate the immigration of Chinese,' and to prevent them from becoming a charge upon the colony. By this statute a poll-tax of ten pounds was imposed upon every Chinese immigrant; but, upon his leaving the colony for foreign parts within three years, having meanwhile abstained from criminal offences and defrayed the cost of any treatment he might have received in any public hospital or asylum, it was provided that this sum should be refunded.

The secretary of state for the colonies, in a despatch dated May 16, 1878, notifying the governor that her Majesty would not be advised to disallow the acts of 1877 above mentioned, expressed a hope that circumstances would not require that they should continue long in operation. While deprecating the introduction of Chinese into Queensland in such numbers as to give them an injurious preponderance, he nevertheless believed that, under proper restrictions as to number and occupation, their labour would be of the highest value to those tropical districts wherein Europeans cannot undertake field work.^e

The acts in question were amended in 1878. But the forementioned laws having been found insufficient to restrict the immigration, the act of 1877 was amended in 1884 by reducing the number of Chinese passengers that might be brought into Queensland waters by any ship to one for every fifty tons of registered tonnage, by increasing the sum payable on arrival to 30*l.*, and by repealing the provision for the repayment of the poll-tax on departure within three years from the date of arrival.^f The effect of the law of 1884 has been that the number of Chinese arriving in Queensland by sea has been in each year somewhat less than the number of those departing. The easy means of transit by land between the various Australian colonies, however, renders it impossible to exercise any effective control over their migration across the borders of the colonies.^g

In 1879 an 'Anti-Chinese Influx Bill,' drawn chiefly on the model of the Queensland act, was submitted by ministers to the New South Wales legislature. It passed the assembly, but was rejected in the legislative council.^h A similar bill was introduced in 1881, and became law.

^e Queensland Leg. Com. Jour.

^g *Ib.* p. 105.

1878, p. 121.

^h 'The Colonies' newspaper,

^f 47 Vic. No. 13; Com. Pap. March 15 and May 24, 1879.

1888, v. 73, p. 171.

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At the opening of the New Zealand parliaments on July 11, 1879, the governor announced that 'a bill to regulate the immigration of Chinese' would be duly submitted. This bill was to be framed in accordance with the legislation in Queensland.^k And the premier presented to the general assembly a memorandum pointing out the need of regulations to restrict excessive Chinese immigration.^l But no legislation then took place. In 1880 a bill to prohibit Chinese immigration was brought in by a private member, who afterwards withdrew it upon an intimation by government that a feeling was growing up all over the colonies that in matters affecting Imperial interests the colonies should act in concert, and the matter should be dealt with on one general principle. Negotiations on this basis had commenced,^m but it was not until 1888 that an act as stringent as that of the other Australian colonies was passed.

At the intercolonial conference held at Melbourne in 1880-81 resolutions were adopted pledging the respective governments to joint legislation upon the Chinese question, and to a joint representation to the Imperial authorities in reference to the treaty relations with China as affecting this matter; and likewise remonstrating against the introduction of Chinese into the Crown colony of Western Australia.ⁿ Subsequently bills were submitted to the several Australian legislatures for the regulation of immigration from China,^o by imposing a poll-tax of 10*l.* per head on all future Chinese immigrants, and restricting the number to be brought by any ship from abroad to one for every hundred tons measurement.

In the colony of Victoria, prior to 1881, the statutes affecting the immigration of the Chinese were not of a very stringent character, but in that year it joined the sister colonies in their efforts to arrest the influx of these undesirable visitors. By the Chinese act, 1881, and section 3 of the Factories and Shops Amendment acts, 1887, vessels are not allowed to bring more than one Chinese per 100 tons of tonnage, and a poll tax of 10*l.* is imposed upon them on their landing.

Notwithstanding these acts there was still a considerable number of Chinese arriving in Victoria from Hong Kong, who produced

^k New Zealand Parl. Deb. v. 28. p. 417.

^l New Zealand Parl. Pap. 1879, D. 3.

^m New Zealand Parl. Deb. v. 36, p. 615.

ⁿ New Zealand Parl. Pap. 1881, No. A. 3.

^o See New Zealand Act, 1881, No. 47; New South Wales, 45 Vic. No. 11; Victoria, 1881, No. 723; South Australia, 1881, No. 213.

what purported to be naturalisation papers, and who claimed to be British subjects. In 1888, some vessels having brought a larger number of immigrants than was allowed by law, the collector of customs refused to receive the 10*l.* poll tax. His action was brought before the courts, and the supreme court of Victoria declared the action of the local government in preventing the landing of Chinese subjects prepared to pay the prescribed poll tax to be illegal. The local government appealed from this decision to the privy council, which reversed the judgment of the colonial court, and held ‘(1) That the collector of customs was under no legal obligation to accept payment tendered by the master on behalf of any such immigrants, nor when tendered either by or for any individual immigrant. (2) Further, that, apart from the act, an alien has not a legal right enforceable by action to enter British territory.’^p After this decision it is unlikely that any future legislation respecting Chinese immigration will be interfered with.

Chinese
question
in
Australia.

At the Australian conference, held in Sydney, June 1888, at which the colonies of New South Wales, Victoria, South Australia, Queensland, Tasmania, and Western Australia were represented, to consider the question of Chinese immigration, the following resolutions were embodied in a draft bill :—

1. That in the opinion of this conference the further restriction of Chinese immigration is essential to the welfare of the people of Australasia.

2. That this conference is of opinion that the desired restriction can best be secured through the diplomatic action of the Imperial government and by uniform Australasian legislation.

3. That this conference resolves to consider a joint representation to the Imperial government for the purpose of obtaining the desired diplomatic action.

4. That this conference is of opinion that the desired Australasian legislation should contain the following provisions :—

(a) That it shall apply to all Chinese, with specified exceptions.

(b) That the restriction should be by limitation of the number of Chinese which any vessel may bring into any Australian port to one passenger to every 500 tons of the ship’s burthen.

(c) That the passage of the Chinese from one colony to another without consent of the colony which they enter be made a misdemeanour.

The first and fourth resolutions were endorsed by all the colonies except Tasmania, which dissented, and Western Australia, which did not vote ; while the second and third were carried unanimously.

^p L. R. App. Cases, 1891, p. 272.

As a whole, therefore, they faithfully represent the opinion of the parliaments and the peoples of Australia.

Chinese
immigra-
tion into
British
Columbia.

Similar difficulties, in regard to an excessive and injurious influx of Chinese immigrants, have been experienced in the westernmost province of the dominion of Canada, British Columbia, which is situated on the Pacific coast. A stringent law, virtually intended to prevent Chinese immigration, was passed by the provincial legislature, and assented to by the lieutenant-governor, on September 2, 1878.^a

An action was immediately instituted in the supreme court of the colony to test the validity of this enactment. On September 23, judgment upon the case was delivered by Mr. Justice Gray, who pronounced the act to be entirely beyond the powers of the local legislature, and therefore unconstitutional and void.^r It was afterwards disallowed by the governor-general in council, upon the principle 'that it was clearly the duty of this government not to allow an act of this nature, which has been declared by the court to be *ultra vires*, to remain on the statute-book.'^s

The British Columbia legislature could not dispute the soundness of this decision as a question of constitutional law. But being impressed with a sense of the injurious effects attending the presence of so large a number of Chinese (estimated at about six thousand) in a province the total population of which, at the census in 1871, was but 33,586 souls (in 1891 the total population was 97,612),^t of the pernicious influence of the Chinese, morally and socially, upon the rest of the inhabitants, and of the injury to the labour market from the unrestricted competition of Chinese workmen, the legislature resolved to address the dominion government, calling attention to these facts, and requesting that the Canadian authorities would co-operate with other British colonies in the endeavour to obtain from the Imperial government permission to restrain, if not entirely to prohibit, the further influx of Chinese into the British colonies, and especially into British Columbia."

Dominion
legislation
on
Chinese
immig-
ration.

In consequence of repeated applications of the British Columbian government calling upon the dominion authorities to interfere in the settlement of the Chinese difficulty, the latter, in the year 1884, appointed a royal commission to study the question in all its bearings. The commissioners accordingly visited California to see the

^a Brit. Columb. Stats. 1878, c. 35, pp. 73, 210.

^r To provide for the better collection of provincial taxes from Chinese.'

^s See *post*, p. 555.

^t Can. Sess. Pap. 1882, No. 141,

^t Census Bulletin, No. 5, p. 19.

^u British Col. Leg. Assem. Jour. 1879, pp. 55, 60, xxiv.

results of Chinese immigration in that state, and to examine on the spot the labours of the committee appointed by the legislature of that state to inquire into the effects produced by the introduction of Chinese labour in competition with white labour, &c. The royal commissioners likewise obtained from Washington special information, where similar materials were available, the United States congress having also appointed a committee to investigate this important question. Finally the royal commissioners held open sittings in the province of British Columbia, where every form of opinion had the chance of obtaining a hearing. In 1885 the commission presented a voluminous report, wherein, after giving a brief description of China, political and social, they gave a résumé of the status of the Chinese in foreign countries, and of the legislation affecting them, along with full reports of the evidence given before them in several parts of British Columbia.

Chinese
question
in Canada.

As the outcome of this report, the dominion government introduced and passed in the session of 1885 an act to restrict and regulate Chinese immigration into Canada.^v The principal provisions of this act are :—

A poll tax on landing of 50 dollars.

No vessel to carry more than one Chinese immigrant to every fifty tons of its tonnage.

Every Chinese person who wished to leave Canada, with the intention of returning thereto, on giving notice of such intention to the controller at the port or place whence he proposed to sail or depart, and surrendering to the said officer his certificate of entry or of residence, to receive in lieu thereof, on payment of a fee of one dollar, a certificate of leave to depart and return.

This act was amended by 50 & 51 Vic. c. 35, but only in some minor details. But by an act passed in the session of 1892 (c. 25) the issue of certificates of leave to depart and return was abolished and a system of registration at the port of departure substituted. It provided that 'the person whose name and description are so registered shall be entitled, on his return, which shall be within six months of such registration, and on proof of his identity to the satisfaction of the controller (as to which decision of the controller shall be final) to receive from the controller the amount of entrance duty paid by him on his return.'

By the latest census returns the following will show the number of Chinese in Canada and the Australasian colonies :—

^v 48 & 49 Vic. c. 71.

Chinese in Canada and Aus- tralasia.	Canada	(1891), 9,127, of which 8,910 resided in the province of British Columbia.
	New South Wales	(1890), 15,581
	Victoria	(1891), 9,377
	Queensland	„ 8,574
	New Zealand	„ 4,241
	South Australia	„ 3,392
	Western Australia	„ 1,020
	Tasmania	„ 943

Chinese
immigra-
tion into
United
States.

The impediments in the way of the settlement, in the interests mainly of particular portions of the community, of a question which involves considerations of treaty obligations and of international rights, are strikingly shown in the fact that similar legislation by the state of California has been pronounced unconstitutional by the supreme court of that state.^w And to the same effect, the United States circuit court, in the Oregon district, decided, in the case of *Baker v. The City of Portland*,—which arose out of an act of the state legislature to prohibit the employment of Chinese labourers on public works—that a treaty between the federal government and a foreign power was the supreme law of the land, which the courts were bound to enforce, and that an individual state could not legislate so as to interfere with the operation of a treaty, or to limit the privileges guaranteed thereby.^x And in 1879, the president of the United States vetoed a bill passed by congress which was intended to discourage Chinese immigration. This bill proposed to restrict the number of Chinese that might be brought over, in a single voyage to the United States, to fifteen persons. In his message to congress, dated March 1, the president stated that, if passed, the bill would virtually annul certain articles of an existing treaty with China; that the power of modifying treaties rested with the executive, not with congress; and that even the acceptance by China of the partial abrogation of the treaty would not justify the action of congress, or render it a competent exercise of constitutional authority. An attempt was made to override the president's veto; but, for lack of the requisite two-thirds majority, it failed.^y

^w *Lin Sing v. Washburn*, 20 Cal. Rep. 534. *The People v. Raymond*, 34 Cal. Rep. 492. See also *Am. Law. Rev. N.S. v. 1*, p. 722.

^x *L.T. Oct. 18, 1879*, p. 403.

^y *Appleton's Cyclopædia*, 1879, pp. 218-226. See the argument of J. C. Kennedy, before the senate committee on foreign relations, in

February, 1878, adverse to legislation for the purpose of restricting Chinese immigration into the United States. *Senate Miscel. Docts. 1877-78*, No. 36. For the views of the late O. P. Morton, ex-senator, on the character, extent, and effect of this immigration, see *ib.* No. 20.

The results of the census in 1880 revealed the fact that the influx of Chinese into the United States has been much exaggerated. In that year the total number of Chinese in the United States was not much over 105,000.² Nevertheless, the wide-spread objections entertained in all English-speaking communities, to Chinese immigration on a large scale, and the determined attitude of the working classes in the United States in resisting the same, pointed to the necessity for more stringent measures to limit and control the influx of this alien population into America and Australia.³

Chinese
question
in the
U. States.

Wherefore in 1880 a new treaty was entered into between China and the United States, whereby the American government was authorised to regulate the admission of Chinese labourers into the United States at their discretion, which sanctioned a limit of immigration, but did not forbid it altogether.

Finally, in March 1888, a new treaty was negotiated between the United States and China, which provided that no Chinese labourer should enter the country. When the treaty reached the senate for approval it was further amended by adding a provision that Chinese labourers formerly in the United States but now absent should be excluded, whether holding certificates to that effect or not. The Chinese government refused to ratify this treaty, and immediately this fact became known a bill was brought forward in the house of representatives embodying this amendment to the treaty approved by the senate some months before. The measure was at once passed without a division and sent to the senate, where it also passed after some discussion, and was signed by the president on October 1. In his message notifying his action the president sets forth 'the admitted and paramount right and duty of every government to exclude from its borders all elements of foreign population which for any reason retard its prosperity, or are detrimental to the moral and physical health of its people, must be regarded as a recognised canon of international law and intercourse.'

For further examples of the disallowance by the Crown of bills passed by colonial legislatures, we may note that of a bill from New South Wales to enable a woman to obtain divorce on the sole ground of her husband's adultery, and an act of Victoria authorising a divorce for desertion for four years, without reasonable cause. In both these cases the royal assent was refused,

Disallow-
ance of
Austra-
lian bills.

² Int. Rev. v. 11, p. 41. Total 277,789. McCarty *An. Stat.*, 1891, number of Chinese arriving in U. p. 167.
States from 1855 to 1889 was

³ Fort. Rev. v. 29, N.S. p. 348.

Deceased
wife's
sister.

Disallow-
ance of a
Natal bill.

because it would occasion confusion throughout the empire, as to the status of persons divorced for such a cause, and of their offspring.^c After repeated instances of the disallowance, by the Crown, of bills passed by different colonial legislatures to legalise marriage with a deceased wife's sister, such enactments have been sanctioned in Ceylon, South Australia, Victoria, Tasmania, New South Wales, Queensland, Western Australia,^d New Zealand,^e Canada,^f and Barbadoes. But as yet (1892) this measure has not become law in the Cape of Good Hope. And a bill from Natal to legalise marriage with a deceased wife's sister has been disallowed—notwithstanding that similar bills had been sanctioned elsewhere—because the restriction still prevails in other South African colonies; ‘it did not appear to be urgently demanded by the people.’^g In regard to such legislation the difficulty still remains, that the Imperial parliament has not yet (1892) agreed to this alteration in the law of marriage.^h Consequently such marriages continue to be illegal in England, and those who avail themselves of the liberty afforded by colonial enactments to contract these marriages expose their offspring to disastrous consequences, as regards both inheritance and legitimacy, in the mother country. Hitherto, the Imperial government and parliament have shown no disposition to alter the law in this respect, for the behoof of the colonies in question.ⁱ

In England ‘with regard to personal property, the children of these marriages are regarded as legitimate; but with respect to

^c Vic. Parl. Pap. 1860–61, No. 58.

^d Hans. D. v. 162, p. 900; v. 201, p. 901; v. 204, p. 1027; v. 222, p. 460; v. 237, p. 158; v. 245, p. 1,792.

^e In 1880 the bill passed both houses in New Zealand, and was reserved. New Zealand Parl. Deb.

v. 37, pp. 304, 826. But the royal assent was given in 1881.

^f Canada Stat. 45 Vic. c. 42.

^g Hans. D. v. 253, p. 407; Nineteenth Cent. v. 6, p. 173.

^h See West. Rev. v. 58, p. 93.

ⁱ South Australia Parl. Proc. 1878, No. 38; Hans. D. v. 238, p. 406; *ib.* v. 244, p. 528.

reality, the statutes of legitimacy which the law of the domicile gives them is not recognised on the ground that the established rule of law in deciding the title to real estate, the *lex loci rei sitæ*, excludes such children.'^j

Deceased
wife's
sister.

^j Hammick's Marriage Law of England and Colonies, p. 253; 8vo, London, 1887.

CHAPTER VI.

IN MATTERS OF INTERNAL ADMINISTRATION.

Interposition of the Crown in internal matters.

THE direct interposition of the Crown, through a department of state, in matters affecting the internal administration of a self-governing colony, would, in general, be at variance with the acknowledged principle of ministerial responsibility within the colony in all matters of local concern.^a Such interference could only be constitutionally invoked, or properly exercised, under the following circumstances: (1) In questions of an Imperial nature,^b or which necessitate action by the Imperial parliament. (2) In the interpretation of Imperial statutes, which have assigned to the Imperial authorities certain specified duties on behalf of the colony, in the performance whereof it would devolve upon a minister of the Crown, responsible to the Imperial parliament, to act and decide, according to law.^c (3) When, either at the express desire or with the concurrence of the local authorities, an appeal has been made to her Majesty's secretary of state for his opinion or decision upon a point whereon disagreements have arisen, between members of the body-politic in the colony, concerning their respective rights and privileges; ^d or (4) By way of suggestion, in order

^a See the address of the Victoria Assembly of June 4, 1868, and the resolutions of that house in Nov. 1869, to this effect, quoted in *Com. Pap.* 1878-79, v. 51, p. 530.

^b See *ante*, pp. 174 *et seq.* and

post, p. 297.

^c See *post*, pp. 204, 734.

^d See *post*, p. 708. See also Mr. Mackenzie's motion, in Canadian House of Commons, on April 27, 1880, in regard to reference of advice of

to bring under the notice of the local authorities in the colony facts, or information upon a particular question of public interest and importance.^e

Whenever reference is made to the Imperial authorities, care should be taken that the claims and contentions of each party to the controversy should be fairly and fully submitted to the consideration of her Majesty's government. At the same time, it rests with the secretary of state, on his own responsibility, to use his discretion as to the means which he should adopt to inform himself upon both sides of colonial questions; and it would be unbecoming and unwarrantable for the local ministers of any colony to suggest any limitation upon this discretion, or to question the right of her Majesty's secretary of state to advise the presentation to the Imperial parliament of any documents that he may think fit to submit to that tribunal, in order that it may be made acquainted with the opinions and arguments advanced on both sides of a litigated question.^f

But even where the authoritative interposition of the Imperial government, in matters of dispute between a governor and his constitutional advisers would be objectionable or of doubtful expediency—as in a question of purely local concern—the governor, in view of his position as an Imperial officer responsible to the Crown through the secretary of state for his public conduct, is always at liberty to appeal to his superior officer for advice and instructions, whenever he is called upon to exercise the royal prerogative, or to give the consent of the Crown to an act of administration. While, on the

When Imperial interposition may be invoked.

Canadian ministers for removal of Lieut.-governor Letellier to the review of her Majesty's advisers in England.

^e Lord Kimberley's despatch of Aug. 11, 1871, transmitting information for adoption of 'The Dry Earth

System.' Queensland Leg. Coun. Jour. 1871-72, p. 409.

^f Secretary Sir M. Hicks-Beach, despatches to Governor Bowen, of July 23 and August 16, 1878, Com. Pap. 1878, v. 56, pp. 908, 921.

Right of
appeal by
governor
to
Imperial
authori-
ties.

other hand, if a governor should transcend his lawful powers, or commit any act to which exception could be justly taken, an appeal is open to the secretary of state. The right of a governor to an appeal to the Imperial authorities, in any matter affecting his character, or conduct in office, even though his ministers may not concur in the necessity for the same, in the particular instance, cannot be questioned. For the authority of a governor is representative and derivative, and he possesses no independent jurisdiction.^g

The undermentioned precedents, which have arisen in Canada since confederation, will serve to explain and enforce this principle.

Interposi-
tion re-
quested
by Nova
Scotia as-
sembly.

In 1868, the year after the establishment of the confederate government in British North America, the provincial assembly of Nova Scotia addressed the Queen, representing that, so far as Nova Scotia was concerned, the confederation had been effected without the people of the province having been freely consulted thereupon; that there was reason to fear that the results of the union would be prejudicial to some of the special interests of Nova Scotia; and therefore praying for the repeal of the Imperial act under which the union had taken place. This address was forwarded to her Majesty through Viscount Monck, the governor-general of Canada.

The secretary of state for the colonies, in a despatch dated June 4, 1868, informed the governor-general that her Majesty's government believed the confederation act 'to be not merely conducive to the strength and welfare of the provinces, but also important to the interests of the whole empire.' They could not therefore advise the reversal of this great measure of state policy. But they would undertake to appeal to the dominion government to remove any just causes of complaint that might be proved to exist on the part of Nova Scotia.^h The dominion government promptly and honourably responded to this appeal, by agreeing to such a modification of the original terms of union as satisfied the

^g See the correspondence between Lord Normanby (governor of New Zealand) and Sir George Grey (premier of the colony) on this subject. New Zealand Pap. 1878, A. 1,

pp. 19-27, A. 2, p. 6; and see *ante*, p. 29; *post*, pp. 438, 630.

^h Lords Pap. 1867-68, v. 15, p. 222.

claims of Nova Scotia, and removed the discontent prevailing in that province.ⁱ

In 1879 the assembly of Nova Scotia addressed the Queen, asking for Imperial legislation to enable them to give effect to the popular desire for the abolition of the legislative council, and in the same session, the legislative council of the province addressed the Queen, protesting against their own extinction, and suggesting other and less objectionable methods of reducing the cost of legislation in Nova Scotia.^j

Precedents of appeal by local legislatures.

In 1880 both houses of the legislature of Prince Edward Island, by a joint address to the Queen, remonstrated against the decision of the government of Canada, that the province was not entitled to receive a share of the money awarded to be paid for the use of Canadian fisheries by the United States, and praying her Majesty to take into consideration the just claims of this province for compensation for the use of its fisheries by United States citizens. This address was forwarded to the Queen through the governor-general.^k

In 1881 it was moved in the Nova Scotia assembly to appeal to the Imperial Crown and parliament to interpose to require the dominion government to assign to Nova Scotia an equitable portion of the fishery award, which had been paid over to the government of Canada by the United States; but, on division, an amendment deprecating an appeal to the Imperial authorities upon a question now under consideration by the dominion and provincial governments, was agreed to.^l

This question was virtually disposed of in the dominion house of commons in 1880. On March 22 of that year resolutions were moved by a private member in the house setting forth that the provinces of Quebec, Nova Scotia, New Brunswick and Prince Edward Island, notwithstanding that they form part of the confederation of Canada, have each claims and rights to distributive shares of the United States fishery award of 5,500,000 dols.^m An amendment was moved by the premier and carried, that the portion of the fishery award paid over to Canada constitutionally and of right belongs to the dominion of Canada.ⁿ

The following case, which involved the question of the interpretation to be put upon a particular section

ⁱ Canada Sess. Pap. 1869, No. 9; *ib.* 1870, No. 41.

^j N. Scotia Assem. Jour. 1881, p. 40.

^k See *post*, p. 699*n*.

^m Can. Com. Deb. 1880, v. 1,

^l P. E. Island Leg. Coun. Jour. 1880, pp. 188, 215.

ⁿ pp. 787-802.

^o Can. Com. Jour. 1880, p. 204.

Precedents of appeal by local legislatures.

of the British North America Act, 1867, was appropriately decided by the Imperial government.

By the twenty-sixth section of the aforesaid statute, the Queen is empowered at any time, on the recommendation of the governor-general, if she thinks fit, to direct that three or six members be added to the senate of Canada, who shall represent equally the three divisions of the dominion.

Appointment of additional senators in Canada.

In December, 1873, on the report of the premier, Mr. Mackenzie, the Canadian privy council advised that an application should be made to her Majesty to add six members to the senate, 'in the public interests.' Though no such reason was alleged at the time, it was not denied that the proposed addition was desired simply for the purpose of remedying the preponderance of the political party adverse to the existing administration in the senate, by the selection of six members who would support the ministry in that chamber.^o This recommendation was forwarded to the secretary of state, through the governor-general.

The colonial secretary (the Earl of Kimberley), in a despatch dated February 18, 1874, stated that after a careful examination of the question, he was satisfied that it was intended that the power vested in her Majesty, under the section aforesaid, should be exercised 'in order to provide a means of bringing the senate into accord with the house of commons, in the event of an actual collision of opinion between the two houses.' And that 'her Majesty could not be advised to take the responsibility of interfering with the constitution of the senate, except upon an occasion when it had been made apparent that a difference had arisen between the two houses of so serious and permanent a character that the government could not be carried on without her intervention, and when it could be shown that the limited creation of senators allowed by the act would apply an adequate remedy.'

Pursuant to an address of the Canadian senate in 1877, this correspondence was laid before that house. And on March 19, five resolutions were agreed to, on division, reciting the facts of the case, expressing a 'high appreciation of the conduct of her Majesty's government in refusing to advise an act for which no constitutional reason could be offered,' and recording the opinion of the senate that any addition to their body under the twenty-sixth clause of the British North America Act, 'which is not absolutely necessary for the purpose of bringing this house into accord with the house of commons, in the event of an actual collision of a serious and per-

^o See Mr. Reesor's amendment, in Canada Senate Jour. 1877, p. 130.

manent character, would be an infringement of the constitutional independence of the senate, and lead to a depreciation of its utility as a constituent part of the legislature.' These resolutions were directed to be transmitted, through the governor-general, to the secretary of state for the colonies, for the information of her Majesty's government.^p

Upon the same principle, the secretary of state for the colonies (Earl of Kimberley) addressed a despatch to Governor Fergusson, of New Zealand, on December 12, 1873, remonstrating against certain observations made on July 29 previous, in the New Zealand house of representatives, by the colonial treasurer and chief minister (Mr., afterwards Sir Julius, Vogel), in his budget speech. Mr. Vogel in treating of colonial loans had implied that the Imperial government gave an 'undisclosed guarantee' for the same; and in reference to the payment of loan interest before other charges, had observed that, 'the governor being an Imperial officer, the Imperial government would be responsible if their nominee did not respect the priority which the law established.'

Imperial
guaran-
tees on
loans.

All such responsibility, as attaching to the Imperial government, the colonial secretary disavowed. Her Majesty's government in no way guarantees colonial loans, 'except for particular amounts specified in Imperial guarantee acts, and inasmuch as it exercises no interference or control as to the financial policy of a colony under responsible government, it shares none of the responsibility for the due payment of the principal and interest of loans which it has not specifically guaranteed.'

Warrants for payment signed by the governor are of the same character as royal orders in this country, which are issued under the royal sign-manual: but her Majesty's signature in no way relieves her ministers from responsibility in respect to the due administration of moneys voted by parliament. 'Her Majesty's government cannot therefore admit, that because the governor is an Imperial servant, the Imperial government would incur any responsibility with regard to moneys issued under his order, beyond that which may be imposed on them by the legislature of this colony.'^q

^p Senate Jour. 1877, pp. 130, 134.

^q New Zealand Parl. Pap. 1873-74, A. 2, No. 25. See also Papers in reference to the claims of Messrs. Brogden, contractors for the construction of railways in New Zealand. These claims arose out of a question raised by Messrs. Brogden against the constitutionality of a statute passed in the colony which

affected their private rights. Instead of raising this question in the colonial courts, which were capable of deciding upon it, the claimants appealed to the secretary of state. The colonial secretary, however, merely requested the governor to bring the case under the notice of his ministers. *Ib.* 1878, E.-3.

British
Columbia
and the
Canada
Pacific
Railway.

In 1873 the government of the province of British Columbia addressed a formal remonstrance to the dominion government, complaining of the non-fulfilment of the terms of union of that province with Canada, in respect to the commencement of a line of railway from the Pacific coast to connect with existing railways in eastern Canada. The reply of the dominion government to this protest not being deemed satisfactory, the provincial government deputed two ministers of the lieutenant-governor's cabinet to proceed to England to appeal to her Majesty's government on the subject. Before the arrival of the delegates, the Earl of Carnarvon, in a despatch to the governor-general of Canada, dated June 18, 1874, intimated his willingness to arbitrate between the two governments, if they would agree to accept his decision upon all matters in controversy between them.

This offer of her Majesty's secretary of state for the colonies was readily accepted by the dominion and provincial governments, and full information upon the points in dispute was communicated to Lord Carnarvon. Whereupon, in a despatch to the governor-general, dated August 16, 1874, he stated the modifications of plan for the commencement and completion of the great trans-continental railway which, in the interest of both parties, he would advise for their acceptance. The Canadian government expressed their willingness to accept these recommendations, if modified in certain particulars. After further consultation with the delegation from British Columbia, the secretary of state, in a despatch dated November 17, 1874, gave his final judgment upon the question, and a statement of the new terms with British Columbia, which he considered were fair and reasonable, in regard to the construction of the Pacific Railway. These terms were frankly accepted by the parties concerned, and they contributed for a time to restore a good understanding between the dominion and provincial governments. But further delays ensued, at which the local government of British Columbia again remonstrated, and on February 2, 1876, the legislative assembly unanimously petitioned her Majesty the Queen, praying that she would cause the dominion government to be immediately moved to give effect to the terms of Lord Carnarvon's settlement, above mentioned.^r

A despatch from the colonial secretary, in reply to the petition of the British Columbia assembly to the Queen, was laid before the local legislature in 1877, together with further papers explanatory of the non-fulfilment, by the dominion government, of the railway clause in the terms of union. With a view to allay the continued

^r Canada Sess. Pap. 1875, No. 19; *ib.* 1876, No. 41.

dissatisfaction and irritation which prevailed in the province on this subject, the governor-general (Lord Dufferin) visited the province in the autumn of 1876, and delivered an able address on the question, vindicating the government of Canada from the imputation of bad faith, and pointing out the enormous and hitherto insuperable difficulties which had occasioned delay in the commencement of this great national work. His excellency's speech was of much service in restoring public confidence, and in reviving a good understanding between the local and the federal governments. It became necessary, however, for the legislative assembly of British Columbia to address a further appeal to her Majesty, in connection with the railway question, in the session held in 1878. But before a reply could be obtained to this address a change of ministry occurred in Canada. The local government received from the new dominion administration assurances that the representations and claims of the province would receive their best consideration. The local legislature re-assembled in January 1879, when correspondence and telegrams on this subject were submitted by the lieutenant-governor, which reanimated the hopes of the province that the national railway would be constructed as speedily as possible. This confidence was expressed by the lieutenant-governor at the close of the session of April 29, 1879, when he referred to the 'assurance given by the dominion government that railway work in the province would not only be commenced, but be vigorously prosecuted this season.'^s

Nevertheless, on March 23, 1881, the legislative assembly of British Columbia deemed it to be expedient to petition the Queen with respect to the breach by the dominion government of their railway obligations to the province; and the Hon. A. De Cosmos was deputed to present this petition to the secretary of state for the colonies. The result of this mission, and the conclusions arrived at by the respective governments, with a view to the speedy settlement of this long-standing dispute, were laid before the British Columbia legislature in the ensuing session. In 1883, the provincial legislature expressed its satisfaction at the energy displayed in the rapid construction of the Canadian Pacific Railway.^t

[On November 6, 1885, the date of the completion of this great trans-continental line, her Majesty's congratulations were cabled to the people of Canada.^u The Canada Pacific Railway was incorporated on February 17, 1881, and received from the government a

^s See correspondence concerning construction of Canadian Pac. Raily. between dominion, Imperial, and provincial governments, from Aug. 1869 to Nov. 1880, in Brit. Columb.

Sess. Pap. 1881, pp. 139-310.

^t *Ib.* 1882, pp. 329-351; *ib.* Jour. 1893.

^u Can. Off. Gaz. v. 19, p. 666.

Canada
Pacific
Railway.

subsidy in money of \$25,000,000, in land of 25,000,000 acres, and had transferred to it, free of cost, 713 miles of railroad, which had been built by the government at an outlay of \$35,000,000.^v

In 1884 the parliament of Canada authorised a loan to the company of \$29,880,912 at 5 per cent. interest, the government as security holding a lien on its entire property ; the money to be paid to the company as the work progressed, and the line to be completed by the end of May 1886. On March 30, 1885, the company, under a new agreement, discharged its obligations to the government.^w

The whole line was completed on November 6, 1885, but was not opened for through traffic until June 28 of the following year.^x]

^v Poor's Manual of Railroads, 1891, p. 1006.

^w *Ib.* p. 1007.

^x For contract of Imperial government with Canada Pacific Railway for conveyance of mails, troops,

and stores from Halifax or Quebec to Hong Kong, and for hire and purchase of vessels as cruisers or transports, vide Com. Pap. 1889, v. 47, p. 317.

CHAPTER VII.

IMPERIAL DOMINION EXERCISABLE OVER SELF-GOVERNING
COLONIES: BY MEANS OF IMPERIAL LEGISLATION.

IN 1766, at the commencement of the unhappy disputes between Great Britain and her colonies in North America, which terminated in the achievement of independence by the United States, an act was passed by the Imperial parliament which was intended to be declaratory of the legislative authority of parliament over the colonies of the British Crown. This statute recited that 'whereas several of the houses of representatives in his Majesty's colonies and plantations in America have of late, against law, claimed to themselves, or to the general assemblies of the same, the sole and exclusive right of imposing duties and taxes upon his Majesty's subjects in the said colonies and plantations, and have, in pursuance of such claim, passed certain votes, resolutions, and orders, derogatory to the legislative authority of parliament, and inconsistent with the dependency of the said colonies upon the Crown of Great Britain;'—be it, therefore, declared that the said colonies in America have been, are, and of right ought to be, subordinate unto, and dependent upon, the Imperial Crown and parliament of Great Britain; and that the King's Majesty, by and with the advice and consent of parliament, had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient

Supreme
authority
of the Im-
perial par-
liament.

force and validity to bind the said colonies, in all cases whatsoever.^a

Mr. Pitt, who then led the opposition in parliament, desired expressly to except from this declaratory act the right of taxation without the consent of the colonists; but the Crown lawyers would not yield the point, and the bill passed without any alteration.^b

Imperial
taxation
of the
colonies.

In fact parliament had exercised the right of taxation in the colonies for nearly one hundred years. The first tax which appears to have been imposed upon the colonies, by the British parliament, was under the act 25 Car. II. c. 7, passed in 1672. This imposed an export duty on certain articles shipped in the colonies for consumption abroad. It was designed for the purpose of protecting and regulating commerce. It was followed, from time to time, by similar acts for the same purpose imposing duties on importations into or exports from the colonies or plantations in America. In 1763, an act was passed continuing, permanently, these protective duties, and directing that the net produce thereof should be reserved for the disposition of Parliament 'towards defraying the necessary expenses of defending, protecting, and securing the British colonies in America,' and in 1767, another act was passed (7 Geo. III. c. 41), to establish in these colonies a board for the management of the customs duties imposed upon goods imported into or exported from those colonies. These protective duties continued to be levied, under parliamentary authority, and their net produce to be paid into the exchequer, until 1845. But by the act 9 & 10 Vic. c. 94, passed in 1846, they came to an end; the various colonial legislatures being empowered, by that statute, to adopt measures, with the sanction of the Crown, for the repeal of any Imperial protective duties

^a 6 Geo. III. c. 12.

^b See May, Const. History, c. 17.

of customs, which had been heretofore imposed upon them.^c

The colonies in North America before their revolt were in the habit of taxing themselves, by their own laws. They not only imposed internal taxation, but also, in certain cases, customs duties on imports. But they never disputed the right of the Imperial parliament to impose duties for the regulation of commerce. In 1765, however, parliament passed the celebrated Stamp Act, 5 Geo. III. c. 12, which authorised the levying, in the colonies, of internal taxation, in aid of the Imperial revenue. This act excited the utmost indignation in America. Those who did not object to Imperial customs duties, which might be necessary for the regulation of trade, and were a natural and equitable toll on merchandise safely carried by ships over seas protected by English fleets, saw a material difference in the attempt to impose duties of excise. It was the general conviction in the colonies that a parliament in which the American people were not duly represented had no right to impose internal taxation. Upon these considerations being made publicly known, by numerous petitions, and especially by the evidence of Dr. Benjamin Franklin, at the bar of the House of Commons, on January 28, 1766, parliament hastened to repeal these objectionable imposts.^d

Stamp
Act.

But, in the following year, a new customs act was proposed, by the chancellor of the exchequer (Mr. Charles Townshend), and enacted by parliament, which was regarded by the American colonists as being equally objectionable. The supporters of this bill, though they admitted that the right of internal taxation

^c Accounts of Public Income and Expenditure, from 1688 to 1869, part 2, pp. 402-405, Com. Pap. 1869, v. 35.

^d *Ib.* p. 403, Com. Pap. 1869, v. 35; Parl. Hist. v. 16, pp. 136-150; act 6 Geo. III. c. 11.

Imposition of customs duties.

of the colonies was virtually extinguished, nevertheless affirmed the continued existence of the right of taxing commodities imported into them from other countries, not merely for the regulation of trade, but also for raising a revenue. And this act proceeded to appropriate the proceeds of certain duties of customs imposed under its provisions to the establishment of a permanent civil list throughout every province in America, and to settle salaries hitherto dependent upon the vote of the local assembly.^e This enactment greatly increased the discontent and disturbance already existing amongst the American colonists, and they came to a general agreement not to import any of the articles on which the new duties were laid. Riots and disturbances occurred at Boston in December 1773, in the attempt to prevent the landing of tea, subject to duty under this obnoxious statute. Thus began the American Rebellion, and a war which was prolonged for seven years, at a cost to Great Britain of £115,654,914. It was finally terminated by the Treaty of Paris, on November 30, 1782, which acknowledged the independence of the United States of America.^f

During the continuance of the war, and with a vain hope of arresting its progress, the Imperial parliament repealed the duty on tea imported from Great Britain into any colony in America, which had been imposed by the act of 7 Geo. III. c. 46; and at the same time renounced the claim of the mother country to impose, merely for the augmentation of the public revenue, any Imperial taxation in the colonies. This was done in 1778, by an act which recited that, in order to aid in restoring peace in his Majesty's dominions, it is expedient to declare that the King and parliament of Great Britain

^e 7 Geo. III. c. 46.

^f Pub. Inc. & Exp. 1688 to 1869, part 2, p. 404, Com. Pap. 1869, v. 35.

will not impose any duty, tax, or assessment, for the purpose of raising a revenue, in any of the colonies; and will only impose such duties as may be necessary for the regulation of commerce, the net produce whereof shall always be applied to and for the use of the colony wherein they shall be levied.^g

The declaratory statute of 1766, with the proviso agreed to in 1778, that it shall not be construed to sanction taxation for revenue purposes, is still to be regarded as embodying the constitutional assertion of the supreme authority which is exercisable by the Imperial parliament over all the Queen's dominions; notwithstanding that they may be in possession of local legislatures with powers for local self-government.^h

Imperial
taxation
for
revenue
purposes
abandoned.

The colonial possessions of the British Crown, howsoever acquired and whatever may be their political constitution, are subject at all periods of their existence to the legislative control of the Imperial parliament. But in practice, especially in the case of colonies enjoying representative institutions and responsible government, the mother country, in deference to the principle of self-government, has conceded the largest possible measure of local independence, and practically exerts its supreme authority only in cases of necessity, or when Imperial interests are at stake.

Colonial
powers of
self-government.

The common law of England is the natural heritage of Englishmen, and is directly applicable to all the colonies of the realm in matters not specially covered by local legislation.ⁱ This principle has been heretofore so well understood, that in the United States the English

^g 18 Geo. III. c. 12. And see v. 233, p. 1401.
Clark, Colonial Law, pp. 13, 14; as regards Canada, see *post*, p. 222.

^h See Clark's Col. Law, p. 10. Forsyth, Const. Law, p. 21. Sir J. Holker (attorney-general), Hans. D.

ⁱ Forsyth, Const. Law, p. 18; Reports on the Colonies for 1879, Com. Pap. 1881, v. 64, p. 126. But see Chitty on Prerogative, p. 32.

Common
law of
England.

common law—which, as well as the statute law, so far as adapted to the condition of the colonies, was brought to America from the mother country, and formed the basis of colonial law, antecedent to the revolution—still continues to prevail, except where modified or superseded by conflicting legislation.^j

Governor's
authority
in a new
colony.

Upon the establishment of a new colony by Great Britain, a governor is appointed to represent the authority of the Crown therein. It is a recognised principle that colonists in settling new territories, within the bounds of the empire, 'carry with them the law of England, so far as it is applicable to their circumstances.'^k Accordingly it is the duty of a governor, when he enters upon his office, to take, without delay or hesitation, whatever steps—not being repugnant to the maxims of English law—he may deem to be essential for the welfare of the colony. This he is competent to do, by the authority committed to him by the Imperial secretary of state, even in anticipation of the receipt of his commission and instructions, which are needful to complete and ratify his legal powers. In colonies acquired by occupancy, the Crown is expressly empowered by the Imperial statutes, 6 & 7 Vic. c. 13 and 23 & 24 Vic. c. 121, to establish, by orders in council, laws, institutions, and ordinances for the government thereof. A governor may, at the outset, be empowered by the Crown 'both to govern and to legislate of [his] own authority,' thereby exercising 'the Crown's general power of legislation,' until it may be practicable and expedient to organise a representative assembly, or at least a non-representative council. 'Acts therefore done [by a governor] in accordance with the law of

^j See authorities cited in Am. Ch. Rev. v. 37-38, pp. 173-213; Southern Law Rev. N.S. v. 8, p. 414; also Lieber's Hermeneutics, 1880. Merivale on Colonisation, ed. 1861, p. 638. Adderley's Col. Policy, pp. 11, 17; and see Mill's Col. Const. p. 18.

^k Clark's Col. Law, Introduction.

England will be substantially legal, although done before any regular authority was constituted.' On his assumption of office, it is advisable that a governor should issue a proclamation to declare the laws of England to be prevalent throughout the colony, subject to any modifications he may think it advisable to introduce. Such a proclamation, however, is 'rather a matter of solemn form than of absolute necessity.' 'But the office of legislation, in the higher and more general sense, should be left for the legislature which may be hereafter constituted.'¹

Governor
of a new
colony.

Accordingly, a patent obtained on behalf of an invention previously unknown in 'the realm of England' is not invalidated because the invention was in use in a British colony, wherein it had been or might have been patented under a local law. For since the Patent Act of 1852 (15 & 16 Vic. c. 83), there has been no instance of letters patent granted in England for the colonies.^m

Patent
law.

The power of the sovereign to make new laws for a conquered country has often been asserted by the courts. But once the Crown has granted to a colony representative institutions, with the power of making laws for its interior government, it has been decided that the Crown alone cannot thenceforth exercise, with respect to such colony, peculiar powers of legislation appropriate to a governor and council; that prerogative having been impliedly renounced by the appointment of a legislative body within the colony itself.ⁿ

When the
Crown
renounces
its pre-
rogatives
in a
colony.

Henceforth it is only such Imperial laws as were in force at the time of the establishment of the colony that

¹ See despatches of secretary Sir 290, 292, 305.

E. Bulwer-Lytton to Governor Douglas on the setting apart of the new colony of British Columbia, dated Aug. 14 and Sept. 2, 1858; Lords Pap. 1859, Sept. 1, v. 6, pp.

^m *Rolls v. Isaac*, L. T. Rep. N. S. v. 45, p. 704.

ⁿ Tarring on the Colonies, pp. 15-18; Amos, *Fifty Years of Eng. Const.* pp. 150-157.

apply to the same, not such as may be thereafter enacted; unless 'by express enactment or by necessary intendment' they are made directly applicable, or are of such general import that it can be reasonably inferred that they were intended to apply to all British subjects.*

Imperial
legisla-
tion in
colonial
concerns.

But the supremacy over the colonies which appertains to the Imperial parliament is a paramount right, and may even be exercised so as to override and control the powers possessed by any local government. The exercise of this authority is, however, reserved for extreme occasions of public necessity. Thus, in 1838 and 1839, parliament, by virtue of its inherent powers, legislated on behalf of Jamaica and of Canada; by a special enactment supplied certain defects, otherwise insuperable, in the laws of Jamaica; and afterwards suspended and remodelled the constitutions of both these colonies.^p

Nevertheless, at the very time when necessity compelled the Imperial parliament to have recourse to these extreme measures, the Crown was careful to define the principles on which the interposition of the supreme authority of parliament over British colonies having representative institutions could alone be justified. In a despatch addressed by the colonial minister (Lord Glenelg) to Sir F. B. Head, upon his appointment as lieutenant-governor of Upper Canada, in 1839, it is stated that 'parliamentary legislation, on any subject of exclusively internal concern, in any British

* Imp. Stat. 3 & 4 Vic. c. 35, sec. 3. And see *Brook v. Brook*, 9 H. of L. Cas. 193; *Routledge v. Low*, 3 L. R. H. of L. 100; *Hodgins v. McNeil*, 9 Grant Ch. Rep. 305; *Penley v. Bacon Assurance Co.* 10 Grant, 422. See full discussion of the general question in *Leith & Smith's Real Property Laws in Ontario*, ch. 2, 2nd ed. Toronto, 1880.

See further on this subject, *post*, p. 242.

^p See *Amos*, pp. 158, 394; *May*, *Const. Hist.* 3rd ed. v. 3, p. 365; and see the debates in the Imperial parliament in 1860, on the bill for the better government of the native inhabitants of New Zealand. *Hans. D. v.* 159, p. 1326; v. 160, pp. 418, 1640.

colony possessing a representative assembly, is, as a general rule, unconstitutional. It is a right the exercise of which is reserved for extreme cases, in which necessity at once creates and justifies the exception.'^a

The subsequent extension, to Canada and to Australia, of the principle of local self-government, or, as it has been usually termed in the colonies, 'responsible government,' set the seal upon all former concessions, and enlarged the bounds of freedom and independence, in the determination of all questions of local concern, by establishing in these colonies institutions which were expressly designed to be 'the very image and transcript' of those of the parent state.

Powers under colonial responsible government.

The first use to which the colonial legislatures applied the enlarged powers conferred upon them by the grant of responsible government was to claim from the mother country the entire control over provincial revenue and expenditure. Heretofore it had been customary for the Imperial parliament to settle the amount that should be paid out of colonial revenues to defray the cost of civil government and of the administration of justice, and to make permanent provision for the same by Imperial enactment. It was thus in New South Wales, under the constitution established in 1842, by the Act 5 & 6 Vic. c. 76. And in other Australian colonies, under the Imperial act 13 & 14 Vic. c. 59, which was passed in 1850. In Canada, the constitutions framed in 1791, and in 1841, by Imperial legislation—notwithstanding that they left considerable amounts of provincial revenue at the annual disposal of

^a Com. Pap. 1839, v. 33, p. 9. And see Earl Grey's observations, on the Ryland case, in the House of Lords, on June 8, 1849. Hans. D. v. 105, p. 1277. See also extracts from despatch of Earl Grey (colonial

secretary) to Governor Fitzroy, of New South Wales, in 1847, *ib.* v. 90, p. 657. And Lord John Russell's speech on Col. Policy, on Feb. 8, 1850, *ib.* v. 108, p. 547.

Civil list.

the provincial parliaments—each contained schedules fixing the sums payable for the services above mentioned (otherwise termed ‘the civil list’), and thereby appropriating colonial revenues, by Imperial authority, without the consent of the local legislature. These revenues mainly consisted of moneys accruing from the sale of ungranted Crown lands in the provinces; or as they were termed, ‘the casual and territorial revenues.’ By despatches from Lord Goderich, secretary of state for the colonies, dated December 20 and 24, 1830, the Imperial government intimated its willingness, with the consent of parliament, to surrender to the control of the legislatures of Upper and Lower Canada the entire revenue raised in Canada under Imperial statutes, on condition of adequate ‘civil lists’ being voted by the provincial legislatures.* But although the Upper Canada legislature thankfully acceded to the principle of this proposal, and immediately passed an act to give effect thereto, differences occurred in both provinces in regard to the details of the arrangement, which involved a protracted controversy between the legislatures and the Imperial government, which lasted until the union in 1841. The legislative assembly of united Canada remonstrated against the continuance of Imperial interference in this matter, by an address to the Queen in 1843. But it was not until 1847 that, by the Imperial act 10 & 11 Vic. c. 71, the legislature was finally empowered to exercise control over the aforesaid revenues, and in lieu thereof to grant a civil list, and to provide for the remuneration of judges, and other officers of the civil service, in the united province. Similar power was conceded to the legislatures of New South Wales and Victoria, in 1855, by the Imperial acts 18 & 19 Vic. cc. 54 and 55, which were passed

* U. C. Assem. Jour. 1836, App. No. 122.

pursuant to an agreement, on the part of the Australian colonies, to accept an offer made to them by her Majesty's secretary of state for the colonies, in 1852, and to make adequate provision for the expenses of the civil government, in return for the surrender to them of the revenues from public lands.^s

And here mention may be made of a curious question which was raised in the colony of Victoria, during the continuance of the 'dead-lock' between the two houses of the legislature, in 1877-78, in regard to the interpretation that should be put upon the forty-fifth section of the Imperial act 18 & 19 Vic. c. 55, for amending the constitution of Victoria. Eminent counsel, consulted by the local government in 1877, gave it as their opinion that this section expressly appropriated so much of the consolidated revenue of the colony as might be required to defray the costs, charges, and expenses incident to the collection, management, and receipt of the provincial revenue; without the necessity for any further grant or appropriation of the same by the parliament of Victoria. Hitherto it had been customary, in Victoria, to disregard this section, and to include all such costs, charges, and expenses, as aforesaid, in the annual votes in supply, and in the subsequent appropriation act passed by the local parliament. Counsel contended, however, that the Imperial act gave ample authority for all such appropriation and expenditure. This interpretation was accepted by the Victoria assembly, and the local government decided to give effect to it, albeit the legislative council protested against the proceeding. The governor (Sir G. Bowen) requested the secretary of state to obtain the opinion of the law officers of the Crown in England upon the point. These officers confirmed the interpretation put upon the act by the colonial lawyers; with a proviso that such expenditure, if incurred under the provisions of the forty-fifth section of the act, must be strictly limited to the purposes therein stated. If diverted to any other purpose, the previous sanction of an act of the Victoria parliament would be required. Fortunately, the temporary settlement of the difficulties between the two houses in Victoria rendered it unnecessary, at this time, to have recourse to this interpretation of the Imperial act to obtain the issue of public moneys for the purposes therein specified.^t ✓

Appropriation of local revenues in Victoria by Imperial statute.

^s Adderley, Col. Policy, pp. 31, 102. And see Lord Glenelg's despatch to the Earl of Gosford, of July 17, 1835, Com. Pap. 1836, v. 39, p. 5. Speech of Hon. Wm. Macdougall, C.B., in the Mercer case, Can. Sup. Ct. Rep. v. 5, p. 544.

^t Victoria Leg. Coun. Jour. 1877-78, pp. 193, 211, App. A. 5; *ib.*

Authority
of local
legisla-
tures.

In giving effect to the principle of local self-government, in colonies possessing representative institutions, the Imperial government has been careful to acknowledge the supremacy of the local legislatures in all matters of local concern, and to refrain from interference in matters which come within the jurisdiction of the colonial authorities, so far as such jurisdiction had been conferred by Imperial legislation.

Prece-
dents.

Thus, by the British North America Act, 1867, the parliament of Canada was empowered to legislate upon all matters affecting 'navigation and shipping' within the dominion. This has been construed to justify the repeal, by that parliament, of Imperial legislation on this subject, and the substitution of local legislation for the same.^u By consent of the Crown, a similar proceeding has been resorted to, in Canada, upon other matters of legislation, with a view to the recognition of the right of self-government in local affairs.^v And in 1884 the supreme court of Canada decided in reference to a question of jurisdiction before the Nova Scotia vice-admiralty court.^w

In 1879, ministers submitted a bill to the Imperial parliament to deal with certain colonial banks which were in operation under royal charters. These charters had been granted before it had become customary to establish joint stock banks under a general law; and the banks were subject to the supervision and control of the treasury, and of other Imperial departments, in respect to divers matters. By this bill it was proposed to do away with this Imperial responsibility, and to subject all banks holding royal charters to the laws of the particular colonies wherein they were situated. This would have the further effect of preventing any unfair advantages on such corporations in comparison with other banks established under colonial laws. The bill was dropped in 1879, but re-introduced in 1880, and referred to a select committee, which reported evidence taken thereon; but owing to the then pending dissolution of parliament it was not pressed in that session. Nevertheless, the general principle of the measure was approved by the house; and the opinion of the treasury was expressed that, in a self-governing colony, the action of the local

1878 (*in loco*). And Com. Pap. 151, and see *post*, p. 225.

1878, v. 56, pp. 856-869, 921. And ^v See *post*, p. 291.

see *post*, p. 784.

^v Att.-Gen. v. Flint, and see 3,

^u See Quebec Law Rep. v. 9, p. Russell & Geldert, p. 455.

legislature would override a royal charter, within the limits of the jurisdiction of that legislature.^x Precedents.

But on June 26, 1883, Sir George Grey (the leader of the opposition in the New Zealand house of representatives) endeavoured to induce the house to assert a wider discretion and authority. He moved for leave to bring in a bill to repeal so much of the Imperial act conferring a constitution upon New Zealand, as declared that that constitution should consist of a legislature composed of a governor and two chambers. By this act the local parliament was empowered to alter the mode of appointing the upper house, but prohibited from abolishing it altogether. The proposed bill ignored this prohibition. The speaker called the attention of the house to the irregularity of this proceeding, as being in direct defiance of Imperial legislation. The prime minister also protested against it; pointing out that the object aimed at could only be attained by passing an address to the Crown for the amendment of the constitution by an Imperial statute.^y But Sir George Grey persisted in his motion, which was carried, against ministers, by a majority of four.^z But on July 18 the motion for the second reading of the bill was negatived by a large majority.^a

In the same session the New Zealand parliament passed a permissive bill, brought in by Sir G. Grey, to sanction an arrangement between New Zealand and any island or group of islands which might desire to confederate with or be annexed to this colony. It merely gave the executive power to arrange terms, and to suggest the same to the Imperial government, for subsequent action at its own discretion.^b

In 1883, by the Imperial act 46 & 47 Vic. c. 30, companies registered under the Companies Act, 1862, are authorised to keep local registers of their members who are resident in any British colony.

The recognition of this principle of local self-government, however, has been gradual; and the Imperial supremacy.

^x Hans. D. v. 250, p. 567; Com. Pap. 1880, v. 8, p. 175; *ib.* 1881, v. 75, p. 437. Meanwhile, companies incorporated under Imperial acts are subject to the law of particular colonies wherein they carry on business, see *post*, pp. 542 557; Can. L. Jour. v. 17, p. 152.

^y See *ante*, p. 165.

^z N. Zeal. Parl. Deb. v. 44, p. 156.

^a *Ib.* p. 659. See also proceedings taken by Victorian government to prevent the landing in the colony of Irish informers in excess of the law of the land, and contrary to the authority of the British government. The Colonies, Oct. 5, 1883, p. 17; *ib.* Oct. 12, p. 28; *ib.* Oct. 19, p. 17.

^b N. Z. Stat. 1883, No. 50. See *post*, p. 248.

supremacy of the Imperial parliament still remains, and can be asserted at its discretion.^c

Colonial
trade and
tariffs.

The freedom granted to the principal British colonies, by the establishment therein of local self-government, began speedily to lead to the demand for complete emancipation from Imperial control in all matters of local concern, including the regulation of their trade and commerce. Heretofore, the imposition of customs duties, and the regulation of trade between the colonies and the mother country, or with foreign countries, as well as all intercolonial commerce, had been regarded as within the undoubted competency, if not within the exclusive jurisdiction, of the Imperial parliament.

Conces-
sions to
Canada.

In Canada—with a view to prevent any dispute) such as that which had led to the separation of the thirteen colonies in America from the mother country) —it was provided, by the Imperial act passed in 1791, for the creation and future government of the provinces of Lower and Upper Canada, that while it was necessary for the general benefit of the empire that the Imperial parliament should continue to exercise the power of regulating commerce in British North America, the net proceeds of all customs duties should hereafter be applied for Canadian purposes only, in such manner as shall be determined by the parliaments of the respective provinces of Canada.^d This practice continued in operation until after the union of the provinces in 1841. On September 8, 1842, the governor-general, in his speech from the throne, at the opening of the legislature, announced that the Imperial parliament had framed a tariff for the British possessions in North America which, it was anticipated, would promote

^c See British N. Am. Act, 1867, Zeal. Private Stat. 1882, No. 1. sec. 129; and see *post*, p. 241; also ^d 31 Geo. III. c. 31, secs. 64, 47. Union Bank of Australia Act, N.

essentially their financial and commercial interests. But this was the last instance of Imperial interference in a matter so vitally affecting the welfare and internal development of the Canadian people.

Consequent upon the incorporation into the commercial system of the mother country of free-trade—a principle which the colonies, generally, were reluctant to accept, and slow to approve—an additional boon was conceded to the self-governing colonies, in the shape of enlarged freedom from Imperial control in the determination of all fiscal and commercial questions.

Every British colony possessing legislative institutions had from the first been more or less free to tax itself, and to impose, with the consent of the Crown, duties of customs upon importations into or exportations from its own territory. But, concurrently with this privilege, the Imperial parliament, as we have seen, retained the right to regulate colonial trade, and to subject the same to certain imposts, at its discretion, with a view to the general regulation and control of the commercial policy of the empire.^e

In 1842, however, the Imperial government undertook to obtain from the Imperial parliament certain advantages for Canada, in the introduction into the United Kingdom of Canadian wheat and flour at a reduced rate of duty, provided that the Canadian legislature would meet the views of her Majesty's government by the imposition of a higher duty upon American wheat imported into Canada. This condition was faithfully observed on both sides, by means of legislation in Canada and in the United Kingdom in the following year.^f The Imperial statute of 1843 was memorable,

Colonial
conces-
sions.

Imperial
and
Canadian
tariff
arrange-
ments,

^e See *ante*, p. 210. And see Earl Grey's paper on the Colonies, in the *Nineteenth Century* for June, 1879; and Lord Norton's reply thereto, in

the July number.

^f See Imp. act 6 & 7 Vic. c. 29; Canada Act 6 Vic. c. 31. This act was reserved, and assented to, after

Rights of
colonies
in framing
tariffs.

not only because it granted to Canada a long-desired boon, in permitting her produce to enter the markets of the mother country upon exceptionally advantageous terms, but for the more important reason that it elicited from leading statesmen in the Imperial parliament an admission of the principle that Canada ought to possess the exclusive right (and prospectively all other British colonies in the enjoyment of 'responsible government') to frame her own tariffs, and to regulate her own trade and commerce at her discretion.^g

In 1846 another Imperial statute was passed, which empowered the British colonies in America, and the colony of Mauritius, to reduce or repeal, by their own legislation, duties imposed by Imperial acts upon foreign goods imported into the said colonies from foreign countries.^h

Canada was not slow to avail herself of this liberty, inasmuch as the introduction of free-trade into Great Britain deprived her of the privileges conferred upon her in 1843, and necessitated defensive measures for the protection of Canadian commerce.ⁱ

In 1852, it was advised by the law officers of the Crown that the Australian constitutions act of 13 & 14 Vic. c. 59, which was passed in 1850, empowered the legislatures of Australian colonies to impose customs duties without it being necessary that bills for this purpose should be reserved by the governor, provided only that they did not impose differential duties.^j

In 1866, by the Imperial act 29 & 30 Vic. c. 74, the Australian colonies were empowered to revise and amend their own customs tariffs, without the necessity

the passing of the Imperial act.
See Canada Leg. Assem. Jour. 1843,
p. 16.

^g See Hans. D. v. 69, pp. 713-
747.

^h Imp. act 9 & 10 Vic. c. 94.

ⁱ See Adderley's Col. Policy,

p. 28.

^j Pakington's desp. of May 11,
1852, to governor of S. Australia,
and Cardwell's desp. of Jan. 24,
1865, to governor of Victoria, Vict.
Leg. Assem. Pap. 1864-65, C. No. 50.

for submitting their statutes to the approval of the Queen, by the governor's reservation thereof, subject however to restraint in the imposition of differential duties.^k

And in the revised edition of the 'Rules and Regulations for her Majesty's Colonial Service,' issued in 1856, this principle was distinctly enunciated in the following terms: 'The customs establishments in all the colonies are under the control and management of the several colonial governments, and the colonial legislatures are empowered to establish their own customs regulations and rates of duty.'^l

Trade and
tariffs
free from
Imperial
control.

An additional benefit was granted to the colonies through the repeal, in 1849, by the act 12 & 13 Vic. c. 29, of the old navigation laws, which had continued in operation for about two hundred years. By these laws, and the system of legislation to which they belonged, the monopoly of a large part of the import trade of the United Kingdom had been secured for British-built ships; and nearly all the trade, both import and export, between the mother country and the colonies, and the entire intercolonial trade, was limited to ships of British tonnage.^m Certain privileges were granted to colonial ships, so that they might share in the protection thus retained against foreign shipping. Nevertheless, to Canada this protection was of small account compared to the injury she sustained by being deprived of the opportunity of securing for her vast system of inland navigation the great and growing carrying-trade of North-western America. Accordingly, in 1848, numerous petitions were sent from Canada for the repeal of the navigation laws, so far as

Navigation
laws.

^k See *post*, p. 227.

^l Sec. 399. And see Brit. N. Am. Act, 1867, sec. 122.

^m For a brief account of the history and present operation of the

Imperial navigation laws, see Stephen's Commentaries on the Laws of England, 11th ed. 1890, v. 3, p. 153.

Repeal of
restrictions on
foreign
shipping.

they applied to Canada, and that the river St. Lawrence might be opened to the use of vessels of all nations." These petitions were responded to by the entire repeal, in 1849, of the restrictions imposed upon foreign shipping in British and colonial trade, save only as respected the coasting trade of Great Britain and her dependencies, which was afterwards dealt with by separate legislation.

Benefit to
colonies
in Im-
perial
Customs
Acts.

The powers of the Canadian legislature and of other self-governing colonies received a further extension by the Imperial Customs Act of 1857, and by the act of 1869, amending the law concerning the coasting trade and colonial merchant shipping. These statutes conferred upon the colonies the right of making entire provision for the management and regulation of their customs, trade, and navigation; subject only to certain limitations, to be hereafter mentioned, in regard to differential duties and to the observance of treaty obligations.^o In 1870 the dominion parliament availed itself of this permission, by passing an act to regulate the coasting trade of Canada.^p And provision has since been made whereby the Imperial government co-operates with the colonies in giving effect to the expressed wishes of the colony in the regulation of its coasting trade, and the trade between two or more British possessions.

In 1880, when the Imperial merchant shipping (carriage of grain) act was passed, Canada was expressly exempted from its operation, chiefly because Canadian legislation on this subject was deemed to be satisfactory and sufficient; but also because it was

^o Canada Leg. Assem. Jour. 1849, App. C.

^p Imp. act, 20 & 21 Vic. c. 62, sec. 15; and 32 & 33 Vic. c. 11; and 39 & 40 Vic. c. 36, secs. 149-151.

^p Canada Act, 33 Vic. c. 14, amended by 38 Vic. c. 27; see also

Canada Act, 43 Vic. c. 29, respecting navigation of Canadian waters, and act 44 Vic. c. 20, to insure uniformity of Canadian and Imperial regulations for prevention of collisions on Canadian waters.

considered that such a law passed in England would not apply to Canada.^q

By the 91st section of the B.N.A. Act, sub-section 10, navigation and shipping are assigned to the exclusive legislative authority of the dominion parliament. This, however, merely operates in restraint of provincial legislation.

From these precedents it will be seen that the authority of the Imperial parliament is no longer used for the purpose of maintaining a uniform commercial policy throughout the empire. Self-governing colonies are now free to regulate their own commercial policy, as they think fit; but with the proviso—which is either expressed or understood, as the case may be—that they may not use their liberty to the direct injury of British commerce, or so as to infringe upon obligations incurred by the mother country in her treaties with other nations. To this extent, restraints upon colonial commercial legislation continue to be maintained, save only as respects the dominion of Canada.

Colonies free to regulate their commercial policy.

By special instructions to colonial governors (but which are no longer issued in relation to Canada), the legislatures are forbidden to impose discriminating or differential duties—so as to bestow exceptional advantages upon foreign over British trade—or to the detriment of countries with which Great Britain has entered into commercial treaties. They are also forbidden to alter duties imposed by the Imperial parliament on British goods, or to interfere in any way with the treaty obligations of the empire.^r

Differential duties.

^q See Rep. on Merchant Shipping, Com. Pap. 1880, v. 11, p. 478. See case of *The Eliza Keith v. The Langshaw*, 3 Quebec L. R. 143; Vice-Ad. Court, case of *The Farewell*, *ib.* v. 7, p. 380.

^r See despatches from the colonial secretary respecting differential duties, in 1843 and 1846. Com.

Pap. 1846, v. 27, pp. 27–55. For similar circular despatches in 1855, see Com. Pap. 1856, v. 44, pp. 169–171, 233. The Australian Constitution Act, 1850 (13 & 14 Vic. c. 59, sec. 27) forbids the imposition of such duties by Australian legislatures; and these colonies, as also New Zealand, are prohibited from

Bounties.

Colonial legislatures were formerly prohibited from granting bounties or exemptions from duty, for the purpose of affording special encouragement to particular branches of commerce or industry, upon the ground that it was the peculiar province of the Imperial parliament to regulate the commercial policy, not only of the United Kingdom, but of the British empire.⁶ But this prohibition is no longer enforced.⁷

Reserved
Imperial
rights.

The Imperial government, however, has not relinquished the right to make general regulations concerning trade and navigation with the British colonies, and to enforce the same by the authority of orders in council, in cases wherein exclusive powers to legislate upon such matters have not been directly conceded to colonial legislatures.⁸ And where local governments are empowered to act independently, within their own jurisdiction, a wider scope and authority is sometimes given to their proceedings or regulations, by means of Imperial orders in council.⁹ Moreover, it is always in the discretion of the secretary of state for the colonies

any fiscal or financial legislation in opposition to any existing treaty between Great Britain and any foreign power. See also Lord Kimberley's despatches of July 13, 1871, and April 19, 1872. (*Post*, p. 258, and South Australia Parl. Proc. 1872, v. 3, No. 104.) And see Mr. Harris's paper on Commercial Advantages of Federation, in Proc. of Royal Col. Institute, on March 14, 1882, with Mr. Labilliere's speech thereon.

⁶ Grey, Col. Policy, v. 1, pp. 279-280. Adderley, Col. Pol. p. 58. Com. Pap. 1864, v. 40, p. 697.

⁷ See Lord Norton's Paper in Nineteenth Cent. for July, 1879, p. 172; Col. Reg. 1892, No. 376.

⁸ *Ib.* No. 377. See also the Imperial Navigation Act, 16 & 17 Vic. c. 107, secs. 181, 185, and 187, regulating certain process in regard to shipping in colonial ports, where

the same has not been provided for by any colonial enactment. And the colonial secretary's circular despatch of Jan. 21, 1878, transmitting copies of Imperial orders in council, to give effect to the Act 15 Vic. c. 26, for the apprehension of deserters from foreign merchant vessels in any part of the empire, whenever foreign powers shall afford similar facilities for the recovery of British seamen deserting within their territories. 'These orders affect the whole of her Majesty's dominions.' New Zealand Parl. Pap. 1878, App. A. 1, p. 12; A. 2, pp. 1-3, 11. For a list of the foreign countries with which this arrangement has been made, see Col. Rules and Reg. 1892, sec. 416.

⁹ Queensland Leg. Coun. Jour. 1878, p. 1087. See also *post*, p. 278.

to make known the views of her Majesty's ministers upon questions of trade and commerce to the governors of colonies, for the information and guidance of the local legislatures.^x

By the Imperial statute 45 & 46 Vic. c. 76, colonial courts or tribunals are empowered to make inquiry into charges of misconduct or incompetency in reference to merchant shipping, and as to shipping casualties, in certain cases, occurring outside the limits of the colony; and colonial legislatures are empowered to authorise such inquiries.^y

But on account of the growing importance of Canada, as well before as since confederation, exceptional privileges have been conceded to her, from time to time, in respect to fiscal and commercial matters wherein the interests of Canada were concerned, with freedom to adopt whatever policy might be approved by the local legislature, irrespective of the opinions or policy of the Imperial parliament.^z

Exceptional privileges allowed to Canada.

In 1859, upon the enactment of a new Canadian tariff, certain manufacturers of Sheffield moved the colonial secretary (the Duke of Newcastle) to protest against it. Whereupon his grace wrote a despatch to the governor-general, dated Aug. 13, 1859, upon the subject. In reply, Mr. (now Sir Alexander) Galt, the Canadian finance minister, wrote a memorandum, which was transmitted to the colonial office by the governor-general, wherein he asserted it to be his duty 'distinctly to affirm the right of the Canadian legislature to adjust the taxation of the people in the way they deem best, even if it should unfortunately happen to meet the disapproval of the Imperial ministry. Her

^x Hans. D. v. 88, pp. 678, 908. Earl Grey's despatches to the governor of Canada in 1846 and 1848; Canada Leg. Assem. Jour. 1847, App. K.; *ib.* 1849, App. N.

^y See further as to Imperial legislation in connection with colonial acts affecting merchant shipping, *ante*, p. 184.

^z See *post*, p. 255.

Stand
taken by
Canada.

Majesty cannot be advised to disallow such acts, unless her advisers are prepared to assume the administration of the affairs of the colony, irrespective of the views of its inhabitants.' This position, he added, 'must be maintained by every Canadian administration.'^a

The Imperial government did not attempt to question the soundness of this position; and they have ever since evinced a disposition to acquiesce in the exercise, by the Canadian parliament, of the utmost freedom in the determination of their commercial policy, without regard to its application to or agreement with the ideas embodied in the legislation of the mother country, or advocated by the ministers of the Crown in Great Britain. ✓

Dominion
commercial legis-
lation.

In the British North America Act of 1867, 'the exclusive legislative authority of the parliament of Canada' was recognised as extending to 'all matters' included in 'the regulation of trade and commerce,' 'the raising of money by any mode or system of taxation,' 'navigation and shipping,' 'currency and coinage,' 'banks and banking.'^b

The extent to which the powers conferred by this statute were immediately acted upon will be apparent on referring to the first customs act passed by the dominion parliament, 31 Vic. c. 7.^c But the term 'exclusive,' above cited, is not to be understood as limiting the inherent legislative powers of the Imperial parliament.^d

And although for a time the restriction upon the imposition of differential duties continued to be enforced, at least to the extent of requiring the governor-general to reserve any bills of this nature for the special consideration of her Majesty's government, yet upon the issue of revised instructions to the Marquis of

^a Mr. Galt's Memorandum, Canada Sess. Pap. 1860, No. 38. And in Com. Pap. 1864, v. 41, p. 79.

^b See the B. N. A. Act, 1867, sec. 91.

^c And see the Report of the Imperial Board of Trade thereon. Canada Sess. Pap. 1869, No. 47, p. 13.

^d See *post*, p. 242.

Lorne, upon his assumption of the government of Canada, in October, 1878, these directions were omitted, and the Imperial government were content to rely upon the prerogative right of disallowance, as a sufficient security against the enactment of any measures, by the parliament of Canada, that should be of such a character as to call for the interposition of the royal veto.^e

Restrictions on differential duties removed.

In the colony of New Zealand, likewise, the prohibition against the imposition of differential duties has been so far relaxed as to permit of bills for this purpose being passed by the colonial legislature, provided only that they (together with any bills that might prejudice the trade and shipping of the United Kingdom and its dependencies) are reserved by the governor for the consideration and approval of the Crown.^f

Respect for the rights of local self-government, previously conceded to the Canadian provinces—and which were ratified and enlarged by the operation of the act establishing the dominion of Canada—has prevented the Imperial government from interposing any other hindrance to the adoption, by the Canadian parliament, of whatever description of commercial legislation might be generally acceptable to the inhabitants of the dominion.

In the session of the Canadian parliament held in 1879, a tariff was enacted which was professedly based upon the principle of protection to native industries. Although this policy was directly opposed to the system of free-trade, approved and enforced by the mother country, the secretary of state for the colonies, on being invited by a prominent member of the House of Commons, on March 20, 1879, to discountenance and disallow the 'Canadian national policy,' declined to

Canadian national policy tariff.



^e See *ante*, p. 118.

^f Memorandum by Mr. (now Sir Julius) Vogel, colonial treasurer of New Zealand, dated Dec. 8, 1871.

South Australia Parl. Proc. 1872, v. 3, No. 104, p. 10.

Canadian
national
policy
tariff.

interfere, alleging that this measure was not in excess of the rights of legislation guaranteed by the British North America Act, under which (subject only to treaty obligations) the fiscal policy of Canada rested with the dominion parliament, and that, however much her Majesty's government might regret the adoption of a protective system, they did not feel justified in opposing the wishes of the Canadian people in this matter.^g

For a copy of the despatch from the governor-general of Canada, respecting the new customs tariff, see Common Papers, 1879, v. 51, p. 1. Further particulars as to the growth of colonial independence, in questions of commercial policy, will be found in the next section, which deals with the treaty-making power, and the rights conceded to the colonies in connection with the negotiation and enforcement of treaties.

Reciprocity
between
Canada
and the
United
States.

Furthermore, in view of the peculiar position in which Canada stands in relation to the United States of America, and to the circumstances of political exigency, and other considerations of importance, which tend to favour the removal of all restrictions to the establishment of reciprocal trade and commercial intercourse between the two countries, her Majesty's government have approved, from time to time, of proposals to effect the same by means of reciprocal and concurrent legislation by Canada and the United States; a method of procedure which has been regarded, by American statesmen, as preferable to that of stipulations by treaty. All such legislation, however, must needs be reviewed by the Imperial government, in order to secure that it should involve no substantial infringement of treaty obligations.

The correspondence between the Imperial and Canadian governments on this subject is contained in Canada Sess. Papers, 1869, No. 47. Examples of such reciprocal legislation will be found in the Canada order in council, issued in 1870, to impose tonnage dues

^g Hans. D. v. 244, p. 1811.

on United States vessels frequenting Canadian ports, to the same extent as the duties to be exacted from Canadian vessels frequenting United States ports.^h An act was passed by the United States congress, in 1877-78, c. 324, authorising Canadian vessels to aid Canadian or other vessels wrecked or disabled in American waters conterminous to Canada, which act was not to take effect until the issue of a proclamation by the president of the United States, declaring that a similar privilege has been extended to American vessels by the government of Canada. From time to time bills were introduced by private members in the dominion house of commons to reciprocate in this matter, but a feeling seemed to prevail in parliament that before passing any such legislation there ought to be some guarantee that the United States government would put the act of congress of 1877-78 in force, should Canada so legislate. Finally, in the winter of 1892, as the result of a ministerial delegation to Washington on international questions, an understanding on this point was arrived at, and a bill was introduced in the session of that year in the Canadian parliament, entitled, 'An act respecting aid by United States wreckers in Canadian waters,' which passed both houses, and received the governor-general's assent before the close of the session. The act provides that it shall be put in force by the governor-general so soon as a like privilege has been extended to Canadian vessels in United States waters ; and by the same instrument it may be revoked.

Reciprocity legislation between Canada and U. States.

A further example of concurrent legislation between Canada and the United States is afforded in the powers granted by both countries for the construction of bridges across the Niagara river, which is the natural boundary between the same. This was first done in 1846, when the Niagara Falls International Bridge Company was incorporated, under acts passed by the parliament of Canada, and by the New York state legislature, respectively. The company so formed by reciprocal legislation was empowered to construct this work, subject to the jurisdiction of the courts of law in each country, to define and enforce the obligations they had incurred by the local legislation under which their chartered rights had been obtained. The prece-

Concurrent legislation between Canada and U. States.

^h Canada Orders in Council, p. 176.

dent thus established has since been followed, in several instances of similar undertakings of mutual benefit and concern to both countries.¹

Colonial
agents-
general.

And here it may be convenient to make mention of an office, of comparatively recent origin, which is gradually acquiring considerable weight and influence in the oversight of the commercial and monetary interests of leading British colonies, and in matters affecting emigration and trade between the colonies and the mother country and foreign nations. I refer to the agents-general, who are deputed by different colonies in Australasia and South Africa, and by the Canadian dominion, to reside in London, expressly to watch over the interests of their respective colonies, to superintend local emigration agencies, and generally to transact business on behalf of their respective colonies with the Imperial government.

Separate agents, appointed by the several colonial governments which are under responsible government, now act independently of the Imperial authorities. Their office is a natural development of arrangements which formerly existed, whereby Crown agents, receiving instructions from their respective colonies in furtherance of financial and general business, requiring to be transacted in London, were subject to the general direction and control of the secretary of state for the colonies, at least in all matters of importance, or which involved any question of principle. But the Imperial government, having ceased to interfere in the local concerns of self-governing colonies, is no longer

¹ See Canada Statutes, 10 Vic. c. 112; 20 Vic. c. 227; 32 & 33 Vic. c. 65; 33 Vic. c. 51. Under the British N. Am. Act, 1867, secs. 91, 92, all such legislation is now assigned to the parliament of the dominion, see *ante*, p. 182; Dom. Stat.

42 Vic. cc. 62, 63, 64; and see Grant, U. C. Chanc. Rep. v. 20, pp. 34, 490; *ib.* v. 28, pp. 65, 114; Ont. App. Rep. v. 6, p. 537; *ib.* v. 7, p. 226; Opinions of Atts.-Gen. State of N. York, p. 227.

willing to permit any direct connexion between the Crown agents and the colonies under responsible government, as the continuance of such relationship would place those officers in an anomalous position, and might give rise to misconceptions in regard to their powers and responsibilities. Directions were accordingly issued, in 1881, to terminate, as speedily as existing contracts and undertakings would permit, all connexion between the Crown agents and any colony having self-governing institutions. This proposal has been favourably entertained by the colonies concerned, and has led to the transference of the duties formerly exercised by the Crown agents to agents-general, representing in London the interests of their respective colonies.^j

Agents-general.

The office of agent-general is now conferred, as a rule, upon men of experience, who have filled the highest positions in the colony, and who are regarded by all parties as possessing special authority and qualifications.

When the office was first created it was not unusual for agents-general to be chosen from, or else to be able to obtain seats in, the Imperial house of commons. But this appeared to be objectionable, for both the Grey and Hall administrations in New Zealand protested against the agent-general (Sir J. Vogel) entering the British parliament, it being considered that such an officer should take no part in British politics, and he was officially notified that he must relinquish any such intention or resign his office as agent-general.^k

With a view to the increased responsibility and consideration which is now attributed to agents-general, it has been proposed to confer upon them a more distinctive and appropriate designation. In fact, the dominion government, in appointing, in November, 1879, Sir Alexander Galt to represent the general interests of

Resident High commissioner for Canada in England.

^j N. Zealand House Jour. 1881, No. 46.
 App. A. 2, a. p. 2; Cape of Good Hope Assem. Votes, 1881, p. 498; Tasmania Leg. Coun. Pap. 1883,
^k N. Zealand Parl. Deb. v. 33, p. 588; v. 35, p. 148; v. 37, p. 732.

Canadian
High-
commis-
sioner.

Canada in England, had already given him a more defined position and larger powers by nominating him, with the consent of the Imperial government, as high commissioner and resident representative agent of the dominion of Canada in the United Kingdom. The duties assigned to this office include three branches: finance, immigration, and diplomacy. The commissioner is specially empowered, as a representative of the Canadian government, to discuss particular local questions with the Imperial authorities; as, for example, the defences of the country, territorial questions and commercial questions.¹

The expediency of this change of title, and its anticipated advantages, are well described in the following extract from a letter, written by Sir Julius Vogel, then agent-general for the colony, to the secretary of New Zealand, dated Feb. 12, 1879:—^m

Proposed
change of
colonial
agents-
general
into
resident
ministers.

In making the recommendation to appoint Mr. Kennaway assistant agent-general, I am assuming, of course, that the title of agent-general is to be continued. There is, however, I think, much to be said in favour of altering this title, and the status of the agent-general. The designation is, I believe, borrowed from that which was formerly borne by the representative of the New England States before the declaration of American independence. But it does not do justice to the many responsibilities and the true position of the officer in question. It is open also to much misconstruction, of which, indeed, there is a ludicrous instance on record. The agent-general of Victoria some years ago ordered the words 'agent-general' to be inscribed on some blinds, in gold letters. Much to his consternation, he found that the artist considered 'general agent' the more correct phrase. It seems to me that the functions of agents-general are eminently representative, and that they should be called resident ministers in England for their respective colonies. At the same time, I think they should have a defined position amongst the Queen's servants, which at present they have not.

¹ Canada Stats. 1880, ch. 11. gave full explanations in regard to
At a banquet given to Sir A. Galt, his intended position and duties.
at Montreal, on March 24, 1880, on ^m N. Zealand Parl. Pap. Sess. II.
eve of his departure for England, he 1879, D. 3.

They are, in fact, without any rank at all. I think, too, that many Agents-general. things which now pass through the governors of colonies, with some risk of disturbing the harmonious relations between the colonies and the mother country, might be dealt with by the resident minister, under direct instructions from the governor in council ; and so the suspicion of personal government be avoided. You will, I hope, acquit me of any personal object in making this recommendation. As an ex-premier of New Zealand, the change would not improve my position ; for the colony has no greater honour to bestow than that which is enjoyed by one who is fortunate enough to have held that high position. The rank of resident minister should, I think, be the same as that of an ordinary minister. I do not think he should necessarily retire with a government any more than ambassadors are in the habit of so doing. An agent-general's position should, in my opinion, be analogous to that of an ambassador, making allowance for the fact that he is representing a portion of the same empire. I find, from a conversation I have had with Sir Archibald Michie (the agent-general for Victoria), that he thinks as strongly as I do, that the designation of agent-general is a mistake. He finds, as I have found, that there are people who consider it to mean a general agency of the most enlarged description of a commercial character.

I have, &c.,

JULIUS VOGEL, *Agent-general*.

The Hon. the Colonial Secretary, Wellington, New Zealand.

In 1881, Sir J. Vogel retired from office as agent-general, because of his unwillingness to relinquish the directorship of an agricultural company, which the government deemed to be incompatible with the office of agent-general. He also objected to carry out, in his department, a reduction of ten per cent. on all official salaries, which had been authorised by the local legislature. Upon his retirement, he addressed a letter to the local government, in condemnation of their policy in this matter, which gave great umbrage, and was returned to the writer. His successor (Sir F. D. Bell) acceded to the terms imposed by the government in tendering to him the appointment, but found it impracticable to administer his department upon the reduced grant. Accordingly it was partially restored, 4,000*l.* originally, to 3,500*l.*

With these substantial reasons to justify the change, it is probable that, after the example of Canada, and with the consent of the Imperial government, the position of the agents-general of the principal British

Proposed
colonial
council.

colonies will hereafter become one of increasing importance.ⁿ

It has been suggested, by a statesman of large colonial experience (Sir Bartle Frere), that they should be formed into a kind of colonial council, on the analogy of the council of the secretary of state for India, and that they should be consulted on all important colonial questions.^o The Marquis of Lorne (ex-governor-general of Canada), in his admirable paper read before the Royal Colonial Institute, on December 11, 1883, says: 'The confederation of the empire, which has been spoken of as possible in the future, must be expressed by no central and unwieldy parliament, representing lands separated from each other by the width of the world, but by a council of envoys, who, by working together for each part, may consummate treaties and enforce agreements.'

Coasting
trade of
British
colonies.

The general control of the coasting trade of British possessions abroad, so far as relates to foreign vessels taking part therein, is retained by the Imperial government,^p notwithstanding the powers granted to colonial legislatures, on this subject, by the colonial merchant shipping act of 1869. Vessels of foreign states are usually allowed a free commercial intercourse with Great Britain and her dependencies upon terms of equality with British vessels; provided only a reciprocal and equal freedom is conceded by such foreign powers.^q

ⁿ See Leg. Coun. Jour. N. South Wales, 1880-81, p. 236. See speeches delivered by agents-general and Lord Derby on his appointment as secretary of state for the colonies, The Colonies, Jan. 19, 1883.

^o Nat. Rev. v. 2, p. 1. See also paper by Sir H. Parkes, on 'Our Growing Australian Empire,' in Nineteenth Cent. v. 15, p. 138.

^p See the Imperial Regulations applicable to United States vessels

navigating British North American waters, to prevent collisions, issued by the Queen in council, on Nov. 30, 1864. (Canadian Orders in Coun. p. 163.) And see the reasons given by the Imperial government for disallowing the Canada Shipping Act amendment in 1878, *ante*, p. 184.

^q Stephen, Commentaries, ed. 1890, v. 3, p. 155. Imp. act, 39 & 40 Vic. c. 36, sec. 141. Com. Pap. 1878-79, v. 77, p. 523.

By the Colonial Merchant Shipping Act of 1869, the legislature of any British possession is empowered to pass an act to regulate the coasting trade thereof; provided that the same shall not go into operation until the pleasure of the Crown is expressly signified; that all British and colonial ships shall be entitled to equal privileges, and likewise ships of foreign nations with whom privileges in respect to the coasting trade of any colony have been granted by treaty.^r Pursuant to this act, Canada statutes 33 Vic. c. 14 and 38 Vic. 27 were passed, to regulate the coasting trade of the dominion; and, by the thirtieth article of the treaty of Washington, 1871, further provision was made thereon, which, after the necessary legislation by the respective governments concerned, was formally ratified, at a conference held at Washington, on June 7, 1873, and went into operation on July 1 following.^s

Coasting
trade.

Maritime jurisdiction over the high seas is a branch of international law which has been administered up to quite recently throughout the British colonies by the Imperial vice-admiralty courts established therein.^t

Maritime
jurisdiction in
Canada.

By Imperial act 30 & 31 Vic. c. 45, authority was given to establish these vice-admiralty courts in any colony, whether as a Crown colony, or as one possessing representative and independent legislation.

The admiralty had power to appoint judges to these courts, though, as a rule, they did not exercise this right. In the absence of any appointment the chief justice or senior judge in the colony was the judge of the court, *ex officio*, who had the authority to appoint the officials of the court when the admiralty had not done so.

^r 32 & 33 Vic. c. 11, sec. 4.

^s See Canada Sess. Pap. 1869, No. 59; *ib.* 1870, No. 37. Orders in Council, p. 401.

^t See Canada Sess. Pap. 1877, No. 54. And report of minister of justice (Mr. Blake) on maritime

jurisdiction; *ib.* No. 13, pp. 25-28. Acts 40 Vic. c. 21; 41 Vic. c. 1; and 42 Vic. c. 40. See *Monaghan v. Horn*, Can. Supreme Court Rep. v. 7, p. 409, as to the jurisdiction of the Ontario court.

Vice-
admiralty
courts.

These courts being Imperial, appeals were direct to the Queen in council. They did not, however, prove altogether satisfactory, owing to the judges presiding over them being also judges in the civil courts of the colony, to which the rules of procedure were different, and the jurisdiction sometimes concurrent, as under the customs acts. Accordingly, in 1883 a circular despatch was sent to the colonies proposing a consolidation of the jurisdiction of the vice-admiralty courts, without altering their constitution or Imperial character. The replies from the various colonies showed that the courts were viewed more in the light of colonial courts, with a desire of having further admiralty jurisdiction conferred upon them. The question was then considered of their abolition, and of the transference of their jurisdiction to the chief courts in the colonies. Accordingly, in 1885 a bill was drafted embodying these proposals, and sent out to the colonies for approval, but it was not acceptable to four of the colonies. In 1890, however, a bill—in substance the same—exempting the four colonies that had demurred,^u became law ;^v making provision ‘to do away with the Imperial vice-admiralty courts in the colonies, and to transfer the admiralty jurisdiction of the high court of justice in England to the colonial courts, and also to allow inferior courts in the colonies, if the colonies so desire it, to exercise the partial and limited admiralty jurisdiction which the county courts in England exercise.’^w Pursuant to authority granted by this Imperial ‘Colonial Courts of Admiralty Act,’ the parliament of Canada passed in 1891 an act to provide for the exercise of admiralty jurisdiction by transferring the same to the exchequer court of Canada.

^u Victoria, New South Wales, Colonial Courts of Admiralty Act, 1890.
British Honduras, and St. Helena.

^w Hans. D. v. 341, p. 1763.

^v 53 & 54 Vic. c. 27. The Co-

The constitutional supremacy of the Imperial parliament over all the colonial possessions of the Crown was formally reasserted in 1865, by an act passed to remove certain doubts respecting the powers of colonial legislatures. This act declares that 'any colonial law which is or shall be in any respect repugnant to the provisions of any act of parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such act of parliament, or having in the colony the force and effect of such act, shall be read subject to such act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.' And, in construing an act of parliament, 'it shall be said to extend to any colony, when it is made applicable to such colony by the express words or necessary intendment of' the same.^x

Reassertion of Imperial supremacy over the colonies.

Validity act

By this rule it is clear that Imperial statutes are binding upon the colonial subjects of the Crown, as much as upon all other British subjects, whenever they relate to or directly concern the colonies.^y Consequently colonial legislation is liable to be restrained by

^x See *ante*, p. 213; 28 & 29 Vic. c. 63, secs. 1, 2.

^y Sir C. Adderley (pres. board of trade), *Hans. D. v.* 229, p. 1334. And see an able letter by 'Historicus,' on this point, in the *Times* of June 1, 1876. For examples of Imperial statutes applicable to the colonies, see the Colonial Rendition of Criminals Act, 6 & 7 Vic. c. 34; and 16 & 17 Vic. c. 118; the Medical Acts of 1858 and 1868; the Colonial Naval Defence Act of 1865; the Documentary Evidence Act of 1868; the Vice-Admiralty Courts Act of 30 & 31 Vic. c. 45, sec. 16;

the Extradition Acts of 1870 and 1873; the Merchant Shipping Acts, 1854 to 1880; the Colonial Shipping Act of 1869; the acts passed in 1870 on coinage and foreign enlistment; in 1875, respecting copyright and unseaworthy ships; and in 1879 for investigating shipping casualties; and the Fugitive Offenders Act of 1881. Other examples are given in Tarring's *Law on Colonies*, ch. vi. See also the *Papers on Merchant Shipping Legislation (Canada)*, Com. Pap. 1876, v. 66, p. 295, and Canada Sess. Pap. 1876, No. 22.

Imperial acts subsequently passed upon questions affecting the colonies.*

Ordinarily, however, colonial legislation within the limits prescribed by the charter, or constitutional law of the colony, is the supreme law governing such portion of the empire.^a

Reserved
powers of
Imperial
parlia-
ment.

The reserved right of intervention and control which must always remain in the Imperial legislature may appropriately be invoked by or on behalf of a British colony, to redress grievances to British subjects which have resulted from the operation of local institutions in any part of the empire; or for the purpose of amending the constitution of a colony, for the benefit of its inhabitants. But no appeal of this kind to the supreme authority of the realm would be constitutionally justifiable, except under circumstances of sufficient gravity and importance to warrant Imperial interference with the rights of local self-government, so far as they have been formally conceded to the particular colony.

Not im-
paired
by the
British
North
America
Act.

The British North America Act of 1867, in distributing the powers exercisable under its provisions, and in vesting 'exclusive' rights of legislation in certain specified matters, either in the dominion parliament or in the provincial legislatures, has in no respect altered the relation of Canadian subjects to the Imperial Crown or parliament, or interposed any additional obstacle to prevent Imperial legislation in reference to Canada, in any case of adequate necessity. The term 'exclusive,' as used in the ninety-first and two following sections of that statute, must be understood as defining and apportioning the limits of legislation in Canada between

* Low & Routledge, L. R. 1 Chanc. App. 45. And see *post*, p. 278.

^a See *ante*, p. 159, and see *Holmes v. Temple* (excluding opera-

tion in Canada of Imp. Army Act of 1881, except so much as was specially introduced by the Dominion Militia Act), *Queb. Law Rep.* v. 8, p. 351.

the dominion and provincial jurisdictions—not as intended to exclude the right of the Imperial parliament, at its discretion, to make necessary laws for the welfare and good government of any portion of the empire.

'Exclusive'
legislation
under
B. N. A.
Act.

It is true that Chief Justice Draper^b expressed an opinion that the term 'exclusive,' in the ninety-first section of the British North America Act, was 'intended as a more definite or extended renunciation on the part of the parliament of Great Britain of its powers over the internal affairs of the new dominion, than was contained in the Imperial statute 18 Geo. III. c. 12, and the 28 & 29 Vic. c. 63, secs. 3, 4, 5.' But we have shown in the text this position is untenable and inconsistent with fact. Indeed, it was overruled by Vice-Chancellor Proudfoot, in *Smiles v. Belford*,^c and it was repudiated by the Ontario court of appeal, in affirming the judgment on this case.^d Finally, in December 1879, Chief Justice Hagarty, in *Regina v. Ontario College of Physicians*,^e defined 'exclusive as opposed to any attempt to legislate by the dominion parliament,' and decided that the provisions of the Imperial act of 1868, concerning medical practitioners, which refer to a 'colony,' are directly applicable to Canada, notwithstanding the powers granted to provincial legislatures to 'exclusively make laws in relation to education.' The correct constitutional doctrine on this point is clearly stated by Mr. Justice Gray of the supreme court of British Columbia, in his judgment delivered on Sept. 23, 1878, on the Chinese tax bill: 'The British North America Act, 1867, was framed, not as altering or defining the changed or relative positions of the provinces towards the Imperial government, but solely as between themselves. . . . Moreover, with reference to the Imperial parliament, as the paramount or sovereign authority, it could not be restrained from future legislation, and therefore, in that light, the term would have no legal bearing. . . . The British North America Act, 1867, was intended to make legal an agreement which the provinces desired to enter into as between themselves, but which, not being sovereign states, they had no power to make. It was not intended as a declaration that the Imperial government renounced any part of its authority.'

For no parliament is competent, by its own act or declaration, to bind or restrain the freedom of action of

^b In case of *Regina v. Taylor*,
36 U. C. Q. B. Rep. 221.
^c 23 Grant, 601.

^d 1 App. Cas. 442.
^e 44 U. C. Q. B. 576.

Parliament may not bind its successors.

Right of Imperial parliament to legislate at its discretion.

Precedents.

a succeeding parliament.^f In fact, legislation, either to remove doubts or to define or enlarge the powers of the dominion parliament, has been undertaken by the Imperial parliament in repeated instances, since the establishment of the Canadian confederation.^g

The absolute and unqualified supremacy of the Imperial parliament over all minor and subordinate legislative bodies—and over all legislation which had previously been enacted by parliament itself—was remarkably exemplified by a decision of the House of Lords, sitting as a court of final appeal, on May 3, 1839, in the celebrated *Auchterarder* case, which led to the disruption of the Church of Scotland:—

Before the union between the parliaments of England and Scotland, which took place in 1701, a settlement was effected between the Crown and the Scottish Established Church, whereby lay patronage was abolished in that communion, and congregations were empowered to elect their own ministers. This settlement was ratified, by an act of the Scottish parliament, in 1690. Immediately after the union of the two countries had been accomplished, the Imperial parliament in 1707 enacted a law to declare that the existing form of Presbyterian church government in Scotland, its doctrine and discipline, should continue unchanged and unalterable.^h Nevertheless, in 1711, parliament, in direct contravention of the settlement aforesaid, repealed the Scotch act of 1690, and restored the exercise of lay patronage.ⁱ This legislation was protested against by the general assembly of the Scottish church, and gave rise to much dissatisfaction throughout Scotland. The general assembly continued to oppose this fundamental alteration in their church law; and finally, in 1834, passed a measure known as the Veto Act, which forbade the exercise of church patronage against the express desires of the particular congregation. Whereupon there ensued the memorable conflict between the Established Church of Scotland and the civil courts of the United Kingdom, which ended in the total discomfiture of the ecclesiastical body. The law

^f See Burke's speech, in 1772, on the proposed alteration of the Act of Union with Scotland, *Parl. Hist.* v. 17, p. 275; *Works*, ed. 1812, v. 10, p. 1.

^g See *Imp. acts* 31 & 32 Vic. c.

105; 32 & 33 Vic. c. 101; 34 & 35 Vic. c. 28; 38 & 39 Vic. cc. 38, 53.

^h The Act of Security, 6 Anne, c. 7, sec. 17.

ⁱ 10 Anne, c. 12.

courts in Scotland, and ultimately the House of Lords, decided that the act of the general assembly restricting the power of patrons was in violation of the Imperial statute of 1711. This statute was declared to be binding upon the Church of Scotland—notwithstanding that it was a direct infringement of the Act of Union—inasmuch as it had emanated from the supreme legislative authority of the realm.^k

Precedents.

Upon the occasion of the union with Scotland an act was passed by the Imperial parliament (5 Anne, c. 5) which provided that the several acts for the establishment and preservation of the Church of England 'shall remain and be in full force for ever.' In the same year the union was effected, and in the Act of Union (c. 8, article 25), the aforesaid act was recited and embodied in that agreement. Furthermore, the establishment of the Church of England in Ireland was declared, in the act of union with Ireland, 'to be in full force for ever,' and 'any intention to subvert the present Church establishment as established by law within this realm' was required to be solemnly abjured by oath. Nevertheless, in 1869 an act of parliament was passed to disestablish and disendow the Irish Church. It is therefore indisputable that such precautionary enactments can only be understood as declaratory of the will of parliament, so long as they remain unrepealed: for no existing parliament deems itself to be bound by the declarations of its predecessors.^l

These decisions warrant the conclusion that by the law of England the Imperial parliament is regarded as omnipotent and supreme in all matters upon which it may undertake to legislate; and that no court of law would venture to question the right of parliament to legislate in any case or upon any question, or presume to assert that any act of the Imperial parliament was *ultra vires*.^m

Supremacy of Imperial parliament.

^k Maclean & Robinson, House of Lords Reports, p. 238 (Auchterarder case). Hanna, Memoirs of Dr. Chalmers, v. 3, p. 267. See Macaulay's account of these transactions, in his speech in House of Commons on July 9, 1845, on Theological Tests in Scotch Universities. The same principle was asserted by the Court of Queen's Bench of Lower

Canada, in 1875, in the case of Brossoit v. Turcotte, L. C. Jurist, v. 20, p. 141.

^l See also Elliot, State and Church, p. 155.

^m C. J. Cockburn and other judges in the 'Franconia' case, Regina v. Keyn; L. R. 2 Ex. Div. pp. 152-160, 207. 'If the legislature of England, in express terms,

Supremacy of parliament.

Corrective power over 'constitutional legislation' in the United States is supplied by the national judiciary, inasmuch as that country possesses a written constitution: but in Great Britain the Imperial parliament is supreme, and its legislation irreversible, except by its own act.ⁿ

As already noticed, it is equally certain that a parliament cannot so bind its successors by the terms of any statute as to limit the discretion of a future parliament, and thereby disable the legislature from entire freedom of action at any future time when it might be needful to invoke the interposition of parliament to legislate for the public welfare.^o *B*

applies its legislation to matters beyond its legislatorial capacity, an English court must obey the English legislature, however contrary to international comity such legislation may be.' Mr. Justice Brett, in *Niboyet v. Niboyet*, L. R. Probate Div. v. 4, p. 20. See Sir J. F. Ste-

phen's Hist. of Crim. Law, v. 2, p. 36; and Judge Palmer's observations in 3 Pugsley & Burbidge, N. B. Rep. p. 143.

ⁿ L. T. (citing American precedents) Dec. 25, 1880, p. 129.

^o See Wilberforce on Statute Law, p. 34, and see *ante*, p. 243.

CHAPTER VIII.

IMPERIAL DOMINION EXERCISABLE OVER SELF-GOVERNING COLONIES: IN FOREIGN RELATIONS; AND THROUGH THE OPERATION OF TREATIES.

It is a rule of international law, that none but supreme and independent sovereign powers are competent to contract treaties with foreign nations. The only exception to this rule is where the right to conclude treaties in its own behalf, with other states or foreign powers, has been expressly delegated to a subordinate government by the Crown and parliament of the mother country. But responsibility for the exercise of such delegated power continues to rest upon the Imperial authority, to the same extent as for the acts of any other accredited public agents of the Crown.^a

Treaty-making power.

The right of extra-territorial jurisdiction was claimed in 1847 as being inherent, under certain circumstances, in the prerogative of the Crown. That right is distinctly asserted, and its exercise regulated by parliament in the foreign jurisdiction acts of 1843, of 1875 and of 1878, by virtue of which it appears that British rule in Cyprus was organised in 1878. Other examples of an extension of jurisdiction by act of parliament over places outside the British dominions

Extra-territorial jurisdiction.

^a Phillimore, *Inter. Law*, 3rd ed. v. 1, p. 199, v. 2, pp. 73-75. See correspondence with Canadian government in 1875 and following years, with a view to modification of Franco-English treaty of 1860, in respect to French duty on Canadian built ships, and as to the admission of French products into Canada on favourable terms. Canada Sess. Pap. 1877, No. 100; *ib.* 1878, No. 70; *ib.* 1880, No. 104.

Extra-
territorial
juris-
diction.

are afforded by the Pacific Islanders protection acts of 1872 and 1875, and by the Territorial Waters Jurisdiction Act of 1878.^b And see the Imperial order in council of August 13, 1877, issued pursuant to the authority of the statutes aforesaid, providing for the establishment of a high commissioner's court in, over, and for the Western Pacific Islands, 'the same not being within her Majesty's dominions, or within the jurisdiction of any civilised power.'^c

The jurisdiction of the high commissioner for the Western Pacific is confined to British subjects in those islands. The inter-colonial conference held at Sydney in 1880-81 entertained certain charges which had been preferred against the high commissioner, and transmitted the result of their inquiry to the Imperial authorities. This proceeding elicited an indignant protest, together with full explanations in rebuttal of the charges from the high commissioner.^d In November 1880, the governor of New Zealand was appointed high commissioner of the Pacific Islands. An assistant high commissioner was also appointed about the same time. It was asserted, however, that the endeavour to repress outrages in the Pacific by the establishment of a high commissioner's court had failed, and that the only remedy for existing evils was for Great Britain to annex, or establish a protectorate over the Western Pacific Islands, and the eastern portion of New Guinea. The principal Australian governments concurred in urging this upon the Imperial government, through their agents-general.^e

Annexa-
tion of
British
New
Guinea.

On February 28, 1883, the agent-general for Queensland was instructed by his government to urge upon the Imperial government the expediency of annexing to that colony the portions of New Guinea not claimed by Holland; Queensland to bear the expense of government and to take formal possession of the territory on receipt of Imperial authority by cable. The reasons advanced by Mr. (now Sir Thomas) Archer in advocating the project were briefly these: That the trade on the coast of New Guinea and the islands adjacent—in which Queensland colonists were chiefly

^b See further on this subject Amos, *Fifty Years Eng. Const.* pp. 187-208; *Law Mag.* Aug. 1882 and May, 1883; *The Channel Tunnel and International Law*; and Stephen's *Hist. of Criminal Law*, v. 2, p. 58.

^c *S. Aust. Parl. Proc.* 1879, No. 131.

^d *N. Zealand Parl. Pap.* 1881, A. 3; *Victoria Parl. Pap.* 1880-81, No. 90; *ib.* 1881, No. 4.

^e *The Colonies*, Aug. 10, 1883, p. 14; *ib.* Sept. 21, p. 6.

engaged—consisted of gold-mining, pearl-diving, and bêche-de-mer fishing, and employed a large and increasing number of colonists, over which the authorities appointed by the Queensland government found it difficult to exercise control, especially as the jurisdiction of its government only extended within sixty miles of the coast of the colony.

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tion of
New
Guinea.

That owing to the extended nature of the jurisdiction of the high commissioner of the Western Pacific, it was not possible for him to exercise an adequate supervision over the settlers rapidly peopling the islands and coast of New Guinea, who were practically beyond the pale of restraint in their dealings with the natives and with each other.

That Queensland had already suffered inconvenience and loss from the escape of political convicts and malefactors from the French penal settlement of New Caledonia; and apprehension was felt in the colony lest some foreign government might institute a similar establishment almost within sight of her territory. 'That in addition to this contingent danger . . . there is an actual and present danger to Queensland interests in the fact of a coastline so near to the scene of several of her industries, and dominating one side of the direct channel of communication between Queensland and Europe, being in the hands of a savage race.' Therefore the colonists of Queensland felt that in their interests it would be most desirable to prevent the possibility of such a misfortune by the annexation of the territory in the immediate proximity to their shores.^f

In reply the colonial secretary stated that her Majesty's government could not form a decision on a subject of such great importance without very full and careful consideration, and that he could express no opinion upon questions raised by the telegram until they had been considered formally by him with his colleagues in the government.

Meanwhile the governor of Queensland received from the colonial secretary a despatch dated March 8, 1883, desiring an expression of his opinion in the matter, accompanied by any observations that would be likely to assist her Majesty's government in arriving at a right conclusion on the question.

But the Queensland government, fearing that in the interim some foreign power might take possession, despatched the police

^f Com. Pap. 1883, v. 47, pp. 164, 200. For joint communication from agents-general of N. S. Wales, New Zealand, Queensland, and Victoria

submitting reasons for the establishment of a protectorate over Western Pacific Islands and eastern part of New Guinea, vide *ib.* p. 621.

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tion of
New
Guinea.

magistrate of Thursday Island to formally annex to Queensland, in her Majesty's name, that portion of New Guinea and the adjacent islands not occupied by the Dutch, pending a decision of the question by the Imperial government.⁸

The other Australasian governments officially approved the action of Queensland in having temporarily proclaimed her Majesty's dominion over the eastern portion of New Guinea, and the Royal Colonial Institute strongly memorialised the British government to annex those parts of New Guinea over which any recognised government could not establish a clear right.

By despatch dated July 11, 1883, the colonial secretary communicated to the governor of Queensland the conclusions her Majesty's government had arrived at on the action taken by the colony in the question of annexation. He stated: 'They are unable to approve the proceedings of your government in this matter. It is well understood that the officers of a colonial government have no power or authority to act beyond the limits of their colony, and if this constitutional principle is not carefully observed, serious difficulties and complications must arise. If there had been any evidence of the intention—which is said to have been apprehended—of a foreign power to take possession of any part of New Guinea, the views and proposals of the colonial government could have been placed before her Majesty's government by telegraph, and if the circumstances had justified immediate action, it could have been taken without a delay of more than a very few hours. It is, therefore, much to be regretted that your advisers should, without apparent necessity, have taken on themselves the exercise of powers which they did not possess. . . . Her Majesty's government regret that it should be necessary from time to time to refuse assent to proposals coming from individual colonies for the assumption of large and serious responsibilities in regard to places and questions not specially concerning those of her Majesty's subjects who live in other parts of the empire; and I trust the time is now not distant when, in respect of such questions (if not for other purposes of government) the Australian colonies will effectively combine together, and provide the cost of carrying out any policy which after mature consideration they may unite in recommending, and which her Majesty's government may think it right and expedient to adopt.

'In the meantime her Majesty's government are of opinion that they must continue to decline proposals for large annexations of territory adjacent to Australia in the absence of sufficient proof of the necessity of such measures. In the case of New Guinea there

⁸ Com. Pap. 1883, v. 47, p. 175. For an account of the ceremony, see *ib.* p. 202.

is already in existence a jurisdiction which may be made to suffice for immediate exigencies. The powers of the high commissioner for the Western Pacific extend to that island, and if the colony of Queensland, with or without assistance from other colonies, is prepared to provide a reasonable annual sum to meet the cost of placing one or more deputies of the high commissioner on the coast, her Majesty's government will be willing to take steps for strengthening the naval force on the Australian station, so as to enable her Majesty's ships to be more constantly present than hitherto in that part of the Pacific.^h

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New
Guinea.

In reviewing this decision of the Imperial government Sir Thomas McIlwraith, the premier of Queensland, says: 'In reply to that portion of the despatch in which Lord Derby remarks that "it is much to be regretted that your advisers should, without apparent necessity, have taken on themselves the exercise of powers which they do not possess," I desire to observe what must have been already clearly perceived from the purport of previous despatches, that in formally annexing New Guinea we were perfectly aware that the efficacy of our action was altogether contingent on subsequent ratification by her Majesty's government. That we had no right, however, without the sanction of her Majesty's government, to annex territory in which there exists no settled government, is contrary to the whole history of colonial acquisition. So far also as concerns the phrase "without apparent necessity," I would submit that political necessity is constituted in a large measure by the pressure of public feeling and opinion; and that these were not wanting in this case is abundantly proved by the favourable verdict of the Australian press, and the support given to our action by the governments of the other Australian colonies. . . . Lord Carnarvon, when appealed to by the colonists to annex New Guinea, virtually consented, provided the colonies relieved the home government of the cost. The expense of government was then the only obstacle, and we have removed that obstacle by offering to provide the necessary funds. With regard to the objection raised by Lord Derby in the extract from his despatch quoted above, I may point out that the annexation of New Guinea to *this* colony is not considered by the government to be a vital part of the question; on the contrary, they would prefer that the territory should be made a Crown colony, or, better still, placed under the control of the "United Australian Colonies." Queensland does not desire an increase of territory. The part she has taken, and is still prepared to take, is to provide for the necessary expenditure, should the terri-

^h Com. Pap. 1883, v. 47, pp. 208, 209.

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New
Guinea.

tory be annexed to her, and thereby remove the only difficulty which, previous to the initiation of the present correspondence, was supposed to exist. The colony will, however, be quite satisfied if annexation to the British Crown takes place in another form. . . . The proposal of Lord Derby to place one or more deputies of the high commissioner on the coast, provided that a reasonable annual sum to meet the cost thereof be paid by this colony, does not at all meet the requirements of the case. The powers of the high commissioner do not extend beyond British subjects.¹

Meanwhile, the government of Queensland adopted the idea suggested in the colonial secretary's despatch of July 11, that a convention should be held to consider the desirability of making further united representations regarding New Guinea and the islands of the Pacific, and to discuss the basis on which a federal government for Australia could be constituted. An intercolonial conference was accordingly summoned, and met at Sydney on November 28, 1883, attended by delegates from all the Australian governments, and closing its session on the eighth of the following month. The convention passed eight resolutions relating to the islands of the Pacific, of which the following were the first and third :—

‘That further acquisition of dominion in the Pacific, south of the equator, by any foreign power, would be highly detrimental to the safety and well-being of the British possessions in Australasia, and injurious to the interests of the empire.’

‘That having regard to the geographical position of the island of New Guinea, the rapid extension of British trade and enterprise in Torres Straits, the certainty that the island will shortly be the resort of many adventurous subjects of Great Britain and other nations, and the absence or inadequacy of any existing laws for regulating their relations with the native tribes, this convention, while fully recognising that the responsibility of extending the boundaries of the empire belongs to the Imperial government, is emphatically of opinion that such steps should be immediately taken as will most conveniently and effectively secure the incorporation with the British Empire of so much of New Guinea, and the small islands adjacent thereto, as is not claimed by the government of the Netherlands.’

In reply to these resolutions, by circular despatch addressed to the Australasian governments, dated May 9, 1884, the colonial secretary said that her Majesty's government were disposed to think that there should be a high or deputy commissioner, with large

¹ Com. Pap. 1884, v. 55, pp. 566, 567.

powers of independent action, stationed in New Guinea ; and that the cost of this system of protectorate should be secured by one or more of the colonies to the Imperial government.^j

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Finally in 1887, at the colonial conference held in London in April and May of that year, the colonial secretary signified to the Australasian representatives the acceptance by her Majesty's government of the proposals, somewhat modified, made by the governments of New South Wales, Victoria, and Queensland in 1886, regarding the administration of New Guinea. To carry out these proposals, the Queensland government passed an act in 1887 (No. 9), which provided that the act would come into force so soon as her Majesty shall have assumed sovereignty over the territory in question ; and that a sum of 15,000*l.* would be paid annually, for the period of ten years, to her Majesty by the government of Queensland for the necessary expenses of administration.

Accordingly, in the following year her Majesty issued letters patent for erecting certain British territory in New Guinea and the adjacent islands into a separate possession, to be known as British New Guinea, and providing for the government of the same.^k

Prior to the abolition of the sovereignty exercised by the British East India Company over India, power was delegated to the company, by various royal charters, which were confirmed by acts of parliament, to make treaties with the native princes under certain restrictions.^l

And pursuant to the ninety-first section of the British North America Act 1867, sub-section twenty-four, which empowers the parliament of Canada to legislate in regard to Indians and Indian lands therein, in connection with the Imperial act 31 & 32 Vic. c. 105, which authorises the transfer to the dominion of Canada of all territories 'held or claimed to be held' by the Hudson Bay Company in North America under their royal charter, authority has been given by the dominion governor-general in council to certain persons to act as commissioners to make and conclude treaties,

Indian
treaties.

^j Com. Pap. 1884, v. 55, p. 755.

^k *Ib.* 1888, v. 73, p. 651.

^l See case of Nabob of the Car-

natic *v.* The East India Company,
1 Ves. Jr. p. 371 ; and 2 *ib.* p. 56.

Indian
treaties.

in the name of her Majesty, with Indian tribes inhabiting the territories of the north-west, which territories are comprised within the limits of the dominion of Canada.^m

In 1875 an act passed by the provincial legislature of British Columbia respecting Crown lands was disallowed by the governor-general in council, because it made no reservation of lands in favour of the Indian tribes in the province, and ignored their rights and privileges. Moreover, under the treaty of capitulation of 1760, the King's proclamation of 1763 establishing governments in British North America, and subsequent Imperial legislation, the right to make treaties with the Indians, and to acquire Indian territorial rights, is vested in the Crown itself, and is exercisable only by the governor or commander-in-chief in the Queen's possessions in North America.ⁿ

Separate colonial governments have no right to communicate officially with one another, except through her Majesty's secretary of state for the colonies, or by direct permission first obtained from the Imperial government.^o

Our epitome of the history of colonial self-government in relation to commercial policy, as given in the preceding pages, would not be complete without some

^m See Canada Statutes, 31 Vic. c. 42; 33 Vic. c. 3; 43 Vic. c. 28. Canada Sess. Pap. 1872, No. 22. Reports of Indian Branch of Department of Secretary of State for the Provinces. In regard to exclusive powers of legislation by parliament of Canada, concerning Indians and Indian lands, and the right of legislation by provincial legislatures concerning lands surrendered by Indians for purpose of being sold, and of which the Indian title had been wholly extinguished, see Mr. Justice Gwynne's judgment, in

Church v. Fenton, 28 U. C. C. P. 384; affirmed by the Ontario Court of Appeals, 4 App. R. 159; and by the Can. Sup. Ct. Rep. v. 5, p. 239. In regard to relations between aboriginal tribes in New Zealand and the colonial government, see Com. Pap. 1864, v. 41, p. 219.

ⁿ Report of H. Bernard, deputy minister of justice, and proceedings thereon, in Canada Sess. Pap. 1877, No. 89, pp. 2-7. But see *ib.* 1882, No. 141, pp. 26, 59, 132.

^o See South Australia Parl. Proc. 1880, v. 3, Nos. 50 and 62.

reference to the circumstances under which colonies, in immediate proximity with each other, have obtained permission to regulate their trade and tariffs at their own discretion, either upon a basis of reciprocity, or otherwise as might be desirable.

Several years prior to the confederation of the British North American provinces, and while as yet their closer union was not contemplated, the expediency of affording to these provinces greater facilities for intercolonial trade, and free commercial intercourse, was the subject of repeated discussions between Canada, the other North American colonies, and the West Indies, on the one hand, and the Imperial government on the other. From 1850 onwards to the time of confederation, partial facilities in this direction received the sanction of her Majesty's government. Although, until after confederation, the objection entertained by the Imperial government to the imposition, by local legislatures, of differential duties, was regarded as insuperable.^p However, in September 1865, the governor-general was authorised, by her Majesty's government, to assemble at Quebec representatives from the North American colonies, for the purpose of holding a 'Confederate Council on Commercial Treaties.' This council was presided over by the governor-general. Various important resolutions were agreed to by the council, chiefly in regard to the renewal of the reciprocity treaty with the United States, and the opening up of trade communications between the British North American provinces and the West Indies, and with Spain and South America. Whereupon, in due course, a commission of inquiry was despatched to South America and the West Indies, and the consent of the Imperial government obtained to the co-operation of Canadian ministers with her Majesty's

Inter-
colonial
commerce
in British
North
America.

^p Com. Pap. 1856, v. 44, 169-233.

Inter-
colonial
commerce
in B. N.
America.

representative at Washington, in negotiations with the United States.^a So far as concerned reciprocal trade between the provinces, this point was finally conceded by the Imperial government in 1861, and by sections 121 to 123 of the British North America Act of 1867, all impediments thereto of reciprocal trade were absolutely removed, and the dominion parliament was authorised to regulate all such matters at its unfettered discretion.^r But so far as regards the British West Indies (which were not included in the confederation of Canada) the Imperial government still refuse to sanction any arrangements which would involve the creation of differential duties in favour of Canada. The dominion government, however, protest against this principle. They claim that, in accordance with the precedent established in 1861, it is competent for any self-governing colony to enter into mutual trade relations with the mother country or with any other self-governing colony, discriminating against other countries. 'The same principle should also apply in the Crown colonies; but as their action must be through her Majesty's government, it is evident that their wishes cannot be carried into effect without the sanction of the Imperial executive.' 'Trade should be rendered as free as practicable between the various portions of the empire, having regard solely to their own interests, and unfettered by any obligations to treat others with equal favour.'^s

Inter-
colonial
commerce
in Aus-
tralia.

The Australian colonies of New South Wales, Tasmania, South Australia, and Victoria, together with New Zealand, were not behindhand in preferring a claim to similar commercial advantages. In 1871 they

^a See Gray's Confederation of Canada, v. 1, p. 296; and *post*, p. 269.

^r For origin and progress of this movement see the Memorandums of the Minister of Finance, Mr.

(afterwards Sir John) Rose, of January 13 and Sept. 3, 1868, in Canada Sess. Pap. 1869, No. 47; also Can. Sess. Pap. 1863, Feb. Sess. No. 14.

^s Can. Sess. Pap. 1883, No. 89, p. 39.

addressed a formal application to the Imperial government for liberty to make arrangements between themselves for the establishment of a commercial union, upon the basis of a common tariff, akin to that which had been effected in Canada, under the British North America Act. But, in addition to this, they demanded that no treaty should be concluded by the Imperial government with any foreign power, which should conflict with the exercise of intercolonial reciprocity; and that Imperial interference with intercolonial fiscal legislation should absolutely cease. They likewise claimed liberty for the several Australian legislatures to impose such duties on imports from other places, not being differential, as each colony might think fit to enact.

Inter-
colonial
commerce
in Aus-
tralia.

On July 13, 1871, the colonial secretary (Lord Kimberley) addressed a circular despatch to the governors of the colonies aforesaid, stating the views of her Majesty's government in reference to these demands. This despatch was carefully considered by the several governments concerned, and their opinions freely expressed upon it. In reply to their joint statements, a further despatch was written on April 19, 1872, by the colonial secretary, which explained the extent to which the Imperial government was willing to accede to their requirements. While desirous to satisfy all reasonable claims, for the removal of restrictions upon commercial intercourse between the Australian colonies, 'her Majesty's government apprehend that the constitutional right of the Queen to conclude treaties binding all parts of the empire cannot be questioned, subject to the discretion of the Parliament of the United Kingdom, or of the colonial parliaments, as the case may be, to pass any laws which may be required to bring such treaties into operation.'^t

^t New Zealand, House of Rep. South Australia Parl. Proceed 1872, Jour. 1871, App. A. No. 1, a. p. 46, v. 3, No. 104.

Inter-
colonial
commerce
in Aus-
tralia.

In February, 1873, an intercolonial conference, held at Sydney, New South Wales, and including delegates from the colonies above mentioned, as well as from Queensland and Western Australia, after duly considering Lord Kimberley's despatch of April 19, 1872, and other correspondence on the subject, resolved again to urge the claims of the Australasian colonies for the removal of all Imperial restrictions which prevented the establishment of intercolonial commercial reciprocity.^u

Australian
Colonies
Duties
Act.

Upon being informed by telegram of the proceedings at this conference, her Majesty's government lost no time in submitting to parliament a bill to give effect to the strongly and repeatedly expressed wish of the Australian colonies on this subject. The 'Australian Colonies Duties' Act, 1873,^v was passed. It gives full power to each of the colonies concerned to make laws, imposing or remitting duties, whether differential or preferential or otherwise, for or against one another. It also extends the powers of the colonial legislatures in Australia to regulate the duties on the importation of articles, not the growth, produce, or manufacture of Australia or New Zealand. But it retains the prohibition against differential duties on goods imported into the colonies from foreign countries or from Great Britain. And it forbids the levying of duties upon articles imported into Australia for the use of the imperial army or navy, and the levying or remitting of any duty contrary to or at variance with any existing treaty between her Majesty and any foreign nation.^v

On November 26, 1880, another intercolonial conference was opened at Melbourne, at which delegates from the colonies of Victoria, South Australia, and New

^u S. Aust. Parl. Proc. 1873, v. 36 Vic. c. 22. Hans. D. v. 215, p. 2, No. 31. 2007; v. 216, p. 157. And see Ad-

^v *Ib.* 1873, v. 3, No. 59. See also Com. Pap. 1873, v. 49, p. 27; Act derley, Colonial Policy, p. 60.

South Wales, were present. Several questions of inter-colonial concern, including the border duties, were then discussed, and a meeting was afterwards held in January 1881, to consider of the establishment of a uniform tariff for all the Australian colonies, and also of the creation of a federal council, and of a uniform railway system. The conference closed on January 27, after coming to a partial agreement on these questions. Their proceedings—together with despatches from the colonial secretary in relation to the questions discussed; and draft bills, for giving effect to their several recommendations—were afterwards laid before the legislatures of their respective colonies and became law.^w

Inter-colonial commerce in Australia.

In January 1882 formal arrangements were made between the governments of Victoria and South Australia, for the admission of goods from one colony to the other, by land, without payment of customs duties.^x

From 1862 to 1880 no less than eight conferences had been held—two at Sydney, and the others at Melbourne—to consider matters affecting the interests of Australasia generally, aside from mere commercial questions; but though a variety of very important subjects had from time to time been ably dealt with by these representative assemblies, little or no result came of their deliberations.^y The Hon. D. Gillies, premier of Victoria, in a speech before the federation conference of 1890, assigned as a reason for this: ‘A number of intercolonial conferences have been held from time to time, but in nine cases out of ten in which they came to agreement on the questions remitted to them for consideration, as to the lines upon which each colony should legislate by itself, from one cause or another the majority of the subjects on which agreements were arrived at, were never legislated on at all. Changes of governments, changes of situations and circumstances, intervened to prevent local legislation on many of the subjects in reference to

Australasian conferences.

^w S. Aust. Parl. Proc. Special Sess. 1881, No. 2; *ib.* Sess. 1881, App. Nos. 28, 34, 68; N. Zealand Parl. Pap. 1881, A. 3.

^x S. Aust. Parl. Proc. 1882, App. x. No. 38.

^y The years in which the con-

ferences were held were 1st, 1862; 2nd, 1867; 3rd, 1870; 4th, 1871; 5th, 1873; 6th, 1877; 7th, 1878; 8th, 1880; these were held at Melbourne, excepting the 5th and 6th, held at Sydney. Year Book of Australia, 1891, p. 13.

Austral-
asian
confer-
ences.

which the basis of legislation had been laid down by the representatives of the different colonies . . . notwithstanding that it was a patent fact to all Australia that uniform legislation was absolutely necessary on important questions on which there was great confusion, and in reference to which it was impossible for each colony to legislate separately on its own lines.'²

In 1883 a convention was held at Sydney, primarily, to consider what action should be taken to secure British protection over islands in the Western Pacific, contiguous to the Australian coasts. The action of Queensland, as noted elsewhere,^a in annexing a portion of New Guinea to that colony had not met with the approval of her Majesty's government, and a feeling of great uneasiness prevailed owing to rumoured designs of Germany on that island, together with the alleged intentions of France to increase her penal colony at New Caledonia. The action of the Imperial government in having refused to recognise the course taken by Queensland in the annexation of New Guinea, brought home to the minds of the leading statesmen of Australia—in a way that never had been done before—the desirability of having some form of federal action, whereby the interests of the colonies, as a whole, might be advanced and dealt with.

Accordingly, at the convention held at Sydney in November 1883, which had been convened at the suggestion of Sir Thomas McIlwraith, the then premier of Queensland, to consider questions incidental to such action, resolutions were submitted relating to the question of island annexation, likewise a federal scheme introduced on motion of the Hon. S. W. Griffith, premier of Queensland :—

Federal
Austral-
asian
council.

'That a committee be appointed to consider and report upon the best mode of constituting a federal Australasian council, and the definition of its functions and authority.'^b This resolution was unanimously adopted, and a draft bill to establish a federal council of Australasia, subsequently presented to the convention, was carried on motion of Mr. Griffith :—'That this convention, recognising that the time has not yet arrived at which a complete federal union of the Australasian colonies can be attained, but considering that there are many matters of general interest with respect to which united action would be advantageous, adopts the accompanying draft bill for the constitution of a federal council, as defining the matters upon which in its opinion such united action is both desirable and practicable at the present time, and as em-

² Speech of Hon. D. Gillies at Federation Conference of 1890 in Australia Proc. p. 115.

^a See *ante*, p. 248.

^b Proceedings of the Convention. Com. Pap. 1884, v. 55, p. 641.

bodying the provisions best adapted to secure that object so far as it is now capable of attainment.'^c

Australasian
conferences.

It was then resolved 'that the governments represented at the convention pledge themselves to invite the legislatures of their respective colonies to pass addresses to her Majesty praying that she may be pleased to cause a measure to be submitted to the Imperial parliament for the purpose of constituting a federal council upon the basis of the draft bill adopted by this convention.'

This was effected by the Imperial parliament passing in 1885 'an act to constitute a federal council of Australasia,' which was identical with the draft bill passed by the conference, saving an addition of the thirty-first clause, giving power to any colony to retire from federation at pleasure. This clause rendered the measure a permissive one, and might fairly be considered as disastrous to its stability. When consulted as to the clause by the colonial secretary, the governments of Queensland, South Australia, Tasmania, and Victoria, strenuously objected to it.^d Addresses, however, were passed by the colonies of South Australia, Western Australia, Fiji, Tasmania, Queensland, and Victoria, favourable to the constitution, but New South Wales and New Zealand declined to accept it, and have not since (1892) consented. 1901

'The Federal Council Act itself contains the principle of subsequent adoption. On some subjects the council has full power to legislate, while on others, brought before it by two colonies, it has no such power; but its acts apply only to the colonies from which the reference came.'^e

The council held its first session in January 1886 at Hobart, and met on three subsequent occasions. Though it debated on important questions affecting the welfare of all the colonies, its powers being more deliberative than legislative, it failed to give satisfaction to those who desired federation.

In 1889 the importance and necessity of federation was brought very prominently before the public throughout Australia from a national point of view, that of a uniform system of defence. As noticed elsewhere, the Imperial government had sent a distinguished officer of the Royal Engineers, Major-General Edwards, to inspect and report on the military forces of the different Australian colonies. In his report this officer pointed out the weakness of their systems of military organisation in the event of the various colonies having to combine for joint action in mutual defence, owing to a lack of

Australian
defence.

^c Proceedings of the Convention. Britain, v. 1, p. 444.
Com. Pap. 1884, v. 55, p. 146.

^d *Ib.* p. 445.

^e Dilke, Problems of Greater

General
Edwards
on Aus-
tralian
defence.

uniformity of administration, their inability to employ their forces beyond their own borders, and the break of gauge existing between the colonies on the railway lines. In a memorandum attached to his report, the general strongly urged a common system of defence by a federation of the forces of the colonies under an Imperial officer of the rank of lieutenant-general, as being more economical and efficient, and concluded by stating that :—‘If the Australian colonies had to rely at any time solely on their own resources, they would offer such a rich and tempting prize that they would certainly be called upon to fight for their independence, and isolated as Australia would be without a proper supply of arms and ammunition—with forces which cannot at present be considered efficient in comparison with any moderately trained army, and without any cohesion or power of combination for mutual defence among the different colonies—its position would be one of great danger. Looking to the state of affairs in Europe, and to the fact that it is the unforeseen which happens in war, the defence forces should at once be placed on a proper footing, but this is, however, quite impossible without a federation of the forces of the different colonies.’^f

Action of
Sir H.
Parkes.

On receipt of this report the premier of New South Wales, Sir Henry Parkes, communicated with the premiers of the other colonies, calling attention to its recommendations, and suggesting a consultation on the questions involved. This resulted in a conference being held at Melbourne on February 6, 1890, all the colonies being represented, the deliberations lasting till the 14th of the same month. The conference passed an address to her Majesty, which concluded by stating :—

‘We most respectfully inform your Majesty that, after mature deliberation, we have unanimously agreed to the following resolutions :—

‘1. That, in the opinion of this conference, the best interests and the present and future prosperity of the Australian colonies will be promoted by an early union under the Crown ; and, while fully recognising the valuable services of the members of the convention of 1883 in founding the federal council, it declares its opinion that the seven years which have since elapsed have developed the national life of Australia in population, in wealth, in the discovery of resources, and in self-governing capacity to an extent which justifies the higher act, at all times contemplated, of the union of these colonies, under one legislative and executive government, on principles just to the several colonies.

‘2. That to the union of the Australian colonies contemplated

^f Com. Pap. v. 1890, 49, p. 119.

by the foregoing resolution, the remoter Australasian colonies shall be entitled to admission at such times and on such conditions as may be hereafter agreed upon.

Aus-
tralian
federation.

'3. That the members of the conference should take such steps as may be necessary to induce the legislatures of their respective colonies to appoint, during the present year, delegates to a national Australasian convention, empowered to consider and report upon an adequate scheme for a federal constitution.

'4. That the convention should consist of not more than seven members from each of the self-governing colonies, and not more than four members from each of the Crown colonies.'^g

A national Australasian convention was accordingly called, pursuant to the above resolution, which met at Sydney on March 2, 1891, and closed its proceedings on the 9th of the following month, to which all the colonies sent representatives according to the number agreed upon at the federation conference of 1890.

Deep interest was manifested throughout the country in the proceedings of the convention, as shown by the receipt of communications from public institutions and societies addressed to the president and delegates expressive of the hope of the adoption of a federal constitution.

On March 18 the following resolutions, after having passed through the various stages of deliberation, were adopted :—

'That in order to establish and secure an enduring foundation for the structure of a federal government, the principles embodied in the resolutions following be agreed to :—

'1. That the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the national federal government.

'2. No new state shall be formed by separation from another state, nor shall any state be formed by the junction of two or more states or parts of states, without the consent of the legislatures of the states concerned, as well as of the federal parliament.

'3. That the trade and intercourse between the federated colonies,

^g Correspondence, &c., on Federation Conference in Australia Com. Pap. 1890, v. 49, p. 139. In moving the first of the above resolutions, Sir Henry Parkes read extracts to the conference from a report of a select committee of the Victorian legislative assembly, dated Sept. 8, 1857, little more than a year after

responsible government had been introduced in that colony, in which arguments advocating federation were most forcibly and conclusively advanced. Sir Henry Parkes's *Speeches on Federal Government of Australia*, pp. 83-85. 8vo. Sydney, 1890.

Aus-
tralian
federation.

whether by means of land carriage or coastal navigation, shall be absolutely free.

'4. That the power and authority to impose customs duties and duties of excise upon goods the subject of customs duties, and to offer bounties shall be exclusively lodged in the federal government and parliament, subject to such disposal of the revenues thence derived as shall be agreed upon.

'5. That the military and naval defence of Australia shall be entrusted to federal forces, under one command.

'6. That provision should be made in the federal constitution which will enable each state to make such amendments in its constitution as may be necessary for the purposes of the federation.'

Subject to these and other necessary conditions, this convention approves of the framing of a federal constitution which shall establish—

'1. A parliament, to consist of a senate and a house of representatives, the former consisting of an equal number of members from each colony, to be elected by a system which shall provide for the periodical retirement of one-third of the members, so securing to the body itself a perpetual existence combined with definite responsibility to the electors, the latter to be elected by districts formed on a population basis, and to possess the sole power of originating all bills appropriating revenue or imposing taxation.

'2. A judiciary, consisting of a federal supreme court, which shall constitute a high court of appeal for Australia.

'3. An executive, consisting of a governor-general, and such persons as may from time to time be appointed as his advisers.'^b

These resolutions were submitted to three committees, the 1st on constitutional machinery and distribution of functions and powers: the 2nd on provisions relating to finance, taxation, and trade regulations: the 3rd on establishment of a federal judiciary, its powers and functions. From the result of the deliberations of these committees, the first committee was instructed by resolution to draft a bill for the establishment of a federal constitution. On April 1 a draft bill 'to constitute the commonwealth of Australia' was presented to the convention for consideration, and after nine days' deliberation adopted. Resolutions were carried that provision be made by the parliaments of the several colonies for submitting for the approval of the people of the colonies respectively the constitution as framed by the convention; and that so soon as the constitution has been adopted by three of the colonies, her

^b Official record of Proceedings Convention, p. 61. Folio. Sydney, and Debates of National Australian 1891.

Majesty's government be requested to take the necessary action to establish the constitution in respect of those colonies.

Australian
federation.

Under the bill the legislative powers of the commonwealth are vested in a federal parliament, consisting of her Majesty, through her representative, a governor-general, a senate, and a house of representatives. The senate is to be composed of eight members from each state or colony, directly chosen by the houses of parliament of the several states; the term for which a senator is chosen being six years. The house of representatives is to be composed of members in proportion to population, one for every thirty thousand, elected every three years by the people of the several states. Provision is made for the establishment of a supreme court, appeals to which shall be final, saving when the Queen may in the public interests grant leave to appeal to the privy council. Any amendment to the constitution must be passed by an absolute majority of the senate and house of representatives, and has thereupon to be submitted to conventions to be elected by the electors of the several states for final settlement, subject to the Queen's power of disallowance. A full text of the bill will be found in 'Imperial Commons Papers,' 1891, c. 6466. *

It is a well-understood principle that the privileges and advantages, commercial or otherwise, which have been accorded to a nation, pursuant to any treaty or convention entered into with another nation, **do** merely extend to the particular state or sovereign power which has contracted the same, **to the exclusion** of the colonial possessions of such power unless they are expressly named in the treaty; and that colonies not so expressly included cannot claim to be admitted to share in the treaty privileges enjoyed by the mother country, as of right, on the ground that they form part of the empire. The colonies of a high contracting power, not included in a treaty, can only be admitted to a participation in the benefits of the same by a further treaty or convention made on their behalf; or by a law, to be passed by the foreign state, admitting them to the enjoyment of the advantages sought to be attained.¹

Extension
of treaty
privileges
to colonies.

* See diplomatic correspondence Canada Sess. Pap., 1876, No. 42. Correspondence respecting the duty on

Treaty
privileges
to
colonies.

But, in point of fact, in the treaties of commerce and navigation now in force between Great Britain and upwards of forty independent foreign powers, such treaties have been expressly made applicable to the British 'dominions,' 'possessions,' or 'colonies,' except in the case of the following nations; viz. China, Japan, Muscat, Siam, and the Sandwich Islands, France, Spain, the Netherlands, and the United States of America. As regards the coasting trade, it is customary to provide that the privilege of sharing therein shall only be granted to those colonies and foreign possessions of any contracting power of which the coasting trade shall have been, or shall be hereafter, open to foreign vessels upon equal terms.^j

The Italian and French governments, having notified the British government of their intention to terminate the existing commercial treaties between themselves and Great Britain, and propositions being entertained for the negotiation of fresh treaties, her Majesty's secretary of state for foreign affairs, on Dec. 31, 1877, communicated with the colonial secretary in reference to the inclusion of the colonies therein. In reply, Lord Carnarvon intimated the propriety of consulting the governors of colonies possessing responsible government in reference to the terms of the proposed treaties before deciding upon the same. He accordingly addressed a circular despatch to the principal colonial governments, transmitting a copy of a draft article, for insertion in future treaties of commerce, applying the same to the British colonies, but with the understanding that no treaty with a foreign power shall include or extend to any British colony which

Canadian ships sold in France, on July 31, 1879, and their special
ante, p. 247*n*. provisions, Can. Sess. Pap. 1880,

^j See the list of treaties in force No. 26.

may desire to be exempted from the operation of the same.^k Treaty
privileges
to
colonies.

This article is as follows: 'The stipulations of the present treaty shall be applicable to the colonies and foreign possessions of the two high contracting parties named in this article.' [Here insert the names of the colonies, &c., to be included in the treaty.] They 'shall also be applicable to any colony or foreign possession, &c., not included in this article, upon the conclusion by the two high contracting parties of a supplementary convention to that effect,' within a specified time after the ratification of such treaty.^l

Accordingly, in the same years new treaties of commerce were signed between Great Britain and Roumania, the republic of Ecuador and Montenegro, but by special request from the dominion of Canada and from the colonies in South Africa, they were exempted from the provisions of the same.^m But objections taken by Canada to a new treaty with Servia, and a request to be relieved, as soon as possible, from the operation of existing commercial treaties with Belgium and Germany, have hitherto been unsuccessful, owing to difficulties raised in those countries respectively.ⁿ In a new Anglo-French treaty, agreed upon in 1882, the British colonies were not included. This led to grave remonstrances on behalf of certain of the principal colonies. In reply the Earl of Kimberley (colonial secretary) intimated that the French government were unwilling that the colonies should participate in the advantages of the new tariff arrangements, because of the high duties placed on the importation therein of French goods, and because of 'the customs autonomy of some of the colonies, and the inability of her Majesty's government to bind them.'^o Prece-
dents.

In 1880 and 1881 correspondence passed between Sir A. T. Galt, on behalf of Canada and the colonial and foreign offices, which resulted in the Imperial government consenting that the government of Canada should hereafter be relieved from the obligation of any new treaties with foreign powers to which objection was taken; NB

^k N. Zealand House Jour. 1881, App. A. 2, pp. 7-9. Hon. G. E. Foster in Canadian Hansard, 1890, p. 1184.

^m Com. Pap. 1881, v. 99, p. 313.

ⁿ Can. Sess. Pap. 1883, No. 89; Can. Hans. D. 1890, pp. 3667-68.

^o The Colonies, March 31, 1882,

^l New Zealand Parl. Pap. 1878, App. A. 2, pp. 9-12.

that Canada should have the option of acceptance or refusal ; and that her high commissioner should be, as far as practicable, associated with the Imperial agents in the negotiation of all foreign treaties in which Canada was interested.^p Sir Charles Tupper was appointed in 1883, also in 1888 co-plenipotentiary, with Imperial representatives, to conduct negotiations with Spain, likewise in the latter year to negotiate with the United States ; and again in 1892-3 to regulate commercial relations between Canada and France respecting customs tariffs.^q

By this means the Imperial government is endeavouring to secure for her colonies the benefits she has herself obtained by the negotiation of commercial treaties with foreign powers ; while, at the same time, she retains in her own hands the right of deciding upon the terms of all treaties, and the extent to which it may be expedient to apply the same to the colonial possessions of the empire.^r

Privileges
to Canada
in nego-
tiating
treaties.

But though the Imperial government has strictly maintained the principle that the negotiation of treaties with foreign powers is a matter of Imperial concern, to be conducted only by agents specially authorised by the Crown, and by ministers directly responsible to the British Parliament,^s a concession has been made in repeated instances to the dominion of Canada, in the negotiation of treaties between her Majesty and the United States of America which have a special bearing upon Canadian interests.

In the years 1871, 1872, and 1873 much correspondence passed between the Imperial and Australian governments, with a view to the modification of the treaty-making power, so as to enable certain of the principal colonies of Great Britain to make reciprocal arrange-

^p Can. Sess. Pap. 1882, No. 73 ; *ib.* 1883, No. 89.

^q Can. Hans. D. 1890, p. 3670 ; Can. Sess. Pap. 1888, No. 36 ; *Ib.* 1893.

^r For the advantages accruing to Canada by the present system of negotiating commercial treaties,

subservient to Imperial interests, see a review of the whole question contained in a speech by the Hon. G. E. Foster, Finance Minister in the Canadian House of Commons, Can. Hans. D. 1890, pp. 1181-1194.

^s See B. N. A. Act, 1867, sec. 132 ; South Africa Act, 1877, sec. 54.

ments with foreign states. But the Imperial government would not surrender the prerogative rights and obligations of the Crown in its international relations, and would only consent to such a modification of the existing practice as would place the Australian colonies, practically, in a position towards each other similar to that of the provinces which form part of the dominion of Canada. This concession was embodied in the Australian Colonies Duties Act, 1873, already referred to.^t On March 21, 1870, a motion was introduced in the Canadian House of Commons, for an address to the governor-general to urge the expediency of obtaining from the Imperial government all necessary powers to enable the government of the dominion to enter into direct communication with other British possessions, and with foreign powers, for the purpose of extending the trade and commerce of Canada abroad. An amendment was proposed to this motion on the part of ministers, deprecating any attempt to enter into treaties with foreign powers 'without the strong and direct support of the mother country,' and asserting that the object in view 'can be best obtained by the concurrent action of the Imperial and Canadian governments.' This amendment was agreed to on a division. On April 21, 1882, Feb. 18, 1889, and April 7, 1892, similar motions were again made, in the Canadian House of Commons, by the Hon. E. Blake, Sir R. J. Cartwright, and Hon. D. Mills respectively, but they were negatived on division.^u The formal steps necessary to empower agents sent from a British colony for the purpose of obtaining an extension of commercial relations between such colony and any foreign country, and the proceedings required to give effect to the same,—so as to bring into the shape of international engagements whatever arrangements might be ultimately considered acceptable, as well to the colonies concerned as also to the foreign powers in question,—are detailed in a memorandum from the under-secretary of foreign affairs (Mr. Hammond) to the under-secretary at the Colonial Office dated Nov. 11, 1865.^v

Attempts
at further
conces-
sions.

In 1871 the prime minister of Canada (Sir John A. Macdonald) was appointed by the Queen to be one of

^t (See *ante*, p. 258.) For the correspondence on this subject, see Com. Pap. 1872, v. 42, p. 739; *ib.* 1873, v. 49, p. 27. Also, New Zealand House of Repres. Jour. 1871, App. v. 1, p. 48; *ib.* 1872, App. A. No. 1, pp. 27, 47. *ib.* 1873, App. A. No. 1, p. 13; No. 2, pp. 7-12.

^u See Canadian Hansard, 1890, p. 3666, for a review of the question by General Laurie on his motion

for a return of all communications that passed between the Imperial and dominion governments with reference to the abrogation of articles in treaties of commerce between the governments of Great Britain and foreign nations that preclude preferential fiscal treatment of goods of British and colonial production by the dominion government.

^v Com. Pap. 1873, v. 49, p. 42.

her high commissioners and plenipotentiaries to frame and conclude upon the treaty of Washington, expressly to represent Canada upon the commission, and in order that the important questions relating to the trade and commerce and fisheries of Canada might be duly considered and determined upon with the assistance of the most competent authority.^w

Previously to this important concession to Canadian interests, the Imperial government had, in 1865, cordially assented that the British minister at Washington should 'act in concert with the government of Canada' in negotiating with the American government for a renewal of the reciprocity treaty.^x

Reciprocity negotiations of 1874 between Canada and U. States.

Again, in 1874, the Imperial government acquiesced in a proposal, made by the privy council of Canada through the governor-general, that the British minister at Washington should be authorised to enter into negotiations with the government of the United States for a treaty to establish reciprocal trade between Canada and the United States. And they agreed to associate with the British minister a commissioner (Senator George Brown) named by the Canadian government; but with the distinct understanding that the Canadian commissioner should act under Imperial instructions, and that all propositions to be made to the American government should be previously submitted to her Majesty's secretary of state.

The dominion government expressed their appreciation of the regard shown to their proposals, in relation to reciprocity with the United States, by her Majesty's government, and promised that they would not suggest any modification, in matters of trade and

^w Governor-general's Speech to Parliament of Canada, on Feb. 15, 1871. Despatch of the Earl of Kimberley (colonial secretary) to Governor-General Lisgar, of June 17,

1871, Canada Sess. Pap. 1872, No. 18.

^x Can. Sess. Pap. 1867-68, No. 63; *ib.* 1869, No. 59.

commerce, which would injuriously affect Imperial interests.

Reciprocity negotiations of 1874.

In June, 1874, a draft commercial treaty was agreed upon by the British, Canadian, and American commissioners, and submitted for the ratification of the Imperial government and of the United States senate. It was approved by her Majesty's government, but failed to receive the sanction of the American senate.^y

On Nov. 26, 1874, while these negotiations were still pending, a deputation from certain British chambers of commerce waited upon the secretary of state for foreign affairs (Lord Derby) and the secretary of state for the colonies (Lord Carnarvon), to express their fears that the proposed reciprocity treaty between Canada and the United States was likely to prove prejudicial to important branches of British industry; and that, contrary to the rule hitherto invariably observed in such treaties, it would place the mother country in a worse position, commercially, than other countries, in regard to the importation of British goods into Canada.

Entirely concurring in the conviction that it was the bounden duty of her Majesty's government to insist that British trade should not be placed at a disadvantage, as compared with other countries, in any treaties which might be entered into on behalf of colonies,—and also to forbid the imposition of differential duties in favour of the United States, as against Great Britain, in any such treaty,—Lord Derby assured the deputation that there was no intention, on the part of her Majesty's government, to allow such a distinction to be drawn, and nothing in the proposed treaty to warrant the conclusion that the Canadian government were in favour of it. As to whether the effect of the treaty would be to increase taxation on other

^y Com. Pap. 1874, v. 75, pp. 931-956.

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than British goods, that was a question hereafter to be considered by the secretary of state for the colonies. Satisfied with these assurances, the deputation withdrew.^a Nevertheless, in 1878, the 'restrictive policy towards Canada was abandoned by the mother country, and the dominion parliament was permitted to adopt whatever form of commercial legislation they might consider to be best suited to Canadian interests, wholly irrespective of the commercial policy of the mother country.^a

In 1879 the Imperial authorities permitted Sir A. Galt, as representing the Canadian government, to share in the conduct of negotiations for improved commercial intercourse between Canada, France, and Spain.^b In the following year, as has been already stated,^c further concessions were granted to Canada, to enable her to exercise a discretion in accepting or rejecting future commercial treaties between Great Britain and foreign countries.

Interpre-
tation and
enforce-
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treaties.

Finally, it should be observed that the responsibility of determining what is the true construction of a treaty, made by her Majesty with any foreign power, must remain with the Imperial government, who can alone decide how far Great Britain should insist upon the strict enforcement of treaty rights, whatever opinions may be entertained upon the subject in any colony specially concerned therein.

The following cases, of comparatively recent date, will illustrate this doctrine :—

In 1884 negotiations calculated to be beneficial to the West Indies were opened up between those colonies and the United States, which resulted in an agreement being drafted between

^a London Times, Nov. 27, 1874, p. 6.

^a Can. Stat. 42 Vic. 15. And see *ante*, p. 230.

^b Can. Sess. Pap. 1880, No. 104. See *ante*, p. 236.

^c See *ante*, p. 267.

these governments whereby some thirty-four articles of West Indian produce, including sugar, under a certain grade, were to be admitted free into the United States.^d This project failed to receive the approval of her Majesty's government, owing to 'the economic principles which it involved, and the revolution which the principles it contained would, if universally accepted, effect in the value of the conventional stipulations as to commerce now existing between the various nations of the earth.'^e It was also contended by the Imperial authorities, as an objection, that it would place a restriction 'on the liberty of each party to deal freely with its own tariffs, without the constant fear that the changes contemplated may lead to the denunciation of the treaty,' and in such a contingency would press more heavily on the West Indies, which would not have the facilities of the United States in finding another market for their produce. Again, that the United States ships engaged in the West Indies trade would be on a better footing than would other foreign vessels engaged in the same trade under the most favoured nation treaty clauses.^f

Precedents.

In October 1890 the United States Congress passed an act entitled 'An act to reduce the revenue and equalise the duties on imports,' known as the 'McKinley Act.' Under the reciprocity clause of this act, 3rd section, certain items are placed on the free list with a view to secure reciprocal trade with countries producing the articles specified in the act, more particularly the West Indies. By this section of the act the president is empowered to levy special rates of duty on the articles thus scheduled, when reciprocal favours are not granted by these colonies, in return, to products of the United States.

McKinley tariff.

The American government invited the attention of the various West Indian colonies to the above legislation, and expressed a desire to enter into reciprocal trade relations with them. The matter was referred to her Majesty's government for consideration, which resulted in negotiations being again opened up between the respective governments. Permission was granted the colonies interested to send delegates to advise the British minister at Washington on questions of local and technical detail, but they were not directly to take part in the negotiation, nor were they permitted to arrange any separate terms for their respective colonies.^g

U. States and West Indies treaty.

A satisfactory understanding was arrived at, and the conclusions

95. ^d Com. Pap. 1884-85, v. 71, p.

^e *Ib.* p. 96.

^f *Ib.* p. 98.

^g Correspondence on commercial

arrangements negotiated between Great Britain and United States on West Indies Trade, Com. Pap. 1892, C. 6680.

U. States
and West
Indies.

of the conference at Washington received the ratification of the Imperial government, after the various West Indian governments concerned had modified their tariffs to carry out its effect. Under these conditions it was estimated that the annual loss to the revenue of the colonies of British Guiana, Trinidad, Leeward Islands, St. Lucia, St. Vincent and Barbados, in lowering their tariffs to meet the proposals of the American government, would amount, in the aggregate, to 67,500*l*.^h

Negotia-
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between
U. States
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land.

On Oct. 22, 1890, the dominion government received from the colonial secretary a telegraphic message, to the effect that the Imperial authorities had consented to negotiate with the United States government with a view to an arrangement under which fish and other products of Newfoundland, irrespective of the interests of Canada, were to be admitted into the United States free of duty, in return for concessions to be made by Newfoundland regarding the purchase of bait by United States fishermen. The high commissioner for Canada was instructed to protest against such an arrangement, which would injuriously affect the commercial interests of the dominion.ⁱ After a lengthy correspondence, the colonial secretary, in a despatch to the governor of Newfoundland, dated Feb. 12, 1891, stated :—

‘Her Majesty’s government have raised no objection on principle to a separate negotiation with a foreign power on behalf of one colony only. It may be in some cases possible so to define the limits of the proposed commercial arrangements as to procure what the particular colony desires without prejudicing the interests of those other portions of the empire which are not included in the arrangement. It will be within your recollection that this subject was discussed with much attention at the colonial conference held in London in 1887 ; and, although the balance of opinion in the conference was against such separate arrangements, it was admitted that her Majesty’s government could not, having regard to the precedents which had been established, refuse to consider the merits of a commercial arrangement desired by one colony only, and the effect which it might have on other British and colonial interests . . . and (in this case) it also became apparent that the United States government was not disposed to extend to Canada the same limited

^h Correspondence on commercial arrangements negotiated between Great Britain and United States on West Indies Trade. Com. Pap. 1892, C. 6680, p. 67.

ⁱ Com. Pap. 1891, C. 6303, pp. 7, 14. For report of privy council of

Canada on the proposed draft convention, and a remodelled draft between Newfoundland and United States, pointing out injurious effects either would have on the commercial interests of Canada, see *ib.* pp. 18–24, 36, 37.

arrangement as it might be willing to adopt in the case of Newfoundland alone.'^j The negotiations accordingly fell through.

On the other hand, the legislature in any colony is free to determine whether or not to pass laws necessary to give effect to a treaty entered into between the Imperial government and any foreign power, but in which such colony has a direct interest.^k

✓ Colony interested need not ratify arrangements made.

Complaints of the non-observance by foreigners of treaty stipulations, and requests for the more expeditious carrying out of treaty requirements, should be addressed by her Majesty's government to the foreign power in question. But, for convenience, it is usual to permit the governor-general of Canada to communicate directly with the British minister at Washington on such matters. Under these circumstances, however, it becomes the duty of the governor-general to notify her Majesty's government, through the colonial secretary, of any representations made or proceedings taken by the dominion government through her Majesty's minister, and of the answers received to the same.^l ✕

Another matter will now claim our attention, which is appropriately regulated by means of treaties between the mother country and foreign powers; namely, the extradition of criminal offenders.

Extradition of offenders.

From a very early period, the nations of Europe have agreed to give up a portion of the general and ordinarily subsisting right of asylum to exiles from

^j Com. Pap. 1891, C. 6303, *ib.* p. 35.

^k Earl of Kimberley's despatches of March 17 and June 17, 1871, to governor-general of Canada, Can. Sess. Pap. 1872, No. 18. Correspondence as to whether British Columbia was included in the purview of the Washington treaty, notwithstanding that she did not en-

ter the dominion until about three months after the treaty was signed. *ib.* 1876, No. 42; 1880, No. 111.

^l Complaints arising out of the Treaty of Washington, Canada Sess. Pap. 1876, Nos. 110, 111; *ib.* 1877, Nos. 14, 104; *ib.* 1878, Nos. 70, 125. And see Dominion Ann. Reg. for 1879, p. 40.

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abroad,^m and have made provision by treaty for the mutual surrender of certain classes of criminals escaping from justice and seeking refuge in other lands.ⁿ But with the exception of a partial arrangement to this effect by the twenty-seventh article of 'Jay's' treaty of 1794, which expired on the breaking out of the war of 1812, no treaty of this kind appears to have been made between Great Britain and the United States of America until 1842, when the subject was included in the Ashburton treaty.^o

By concurrent legislation.

Meanwhile, notwithstanding the lack of any treaty obligations on this subject, legislative provision for the rendition of fugitives from justice was made in 1822 by the legislature of the state of New York, and in 1833 by the parliament of the late province of Upper Canada.

- ✓ The general principle of legislation, by local ordinance or statute, for the delivery to foreign governments of fugitive criminals, has been repeatedly admitted in various colonies and possessions of the British Crown, under circumstances which have made it difficult or impossible to provide for the same by treaty. But it should be stated that eminent judges of the federal courts of the United States have decided that the statute enacted by the New York legislature in 1822, above referred to, is in contravention of the constitution of the United States, article one, section ten, which says that 'no State shall enter into any treaty;' and it was observed by Judge Curtis 'that, in the fifty years which had elapsed since the passage of the state

^m In regard to 'the right of asylum,' under English law, to political offenders, see L. T. June 4, 1881, p. 75.

ⁿ See articles in Law Mag. for May, 1881, p. 262, and in Am. L.

Rev. (on foreign extradition) for June, 1883. And see *in re* W. A. Hall, 3 Ont. Rep. 331; 8 Ont. App. Rep. 135.

^o See Com. Pap. 1876, v. 82, p. 279.

law, no case is remembered in which a governor has undertaken to make extradition under it. During this half-century it has been considered that the national government had exclusive jurisdiction over the subject, and that the act of the state legislature was unconstitutional and void.^p This is unquestionably sound doctrine, and equally applicable to legislation by British colonies where there has been no previous treaty or act of the Imperial parliament, nor Imperial sanction to colonial legislation authorising the same. For, in view of the importance of regulating all international questions upon a uniform basis and by the supreme authority of the empire, it is obvious that the extradition of criminals should be provided for by treaties between the powers concerned therein, by special legislation based upon formal treaties, or by direct consent of her Majesty's government to any colonial enactment pertaining thereto. ✓

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✓ By the one hundred and thirty-second section of the British North America Act of 1867, it is enacted that 'the parliament and government of Canada shall have all powers necessary or proper for performing the obligations of Canada, or of any province thereof, as part of the British Empire, **towards foreign countries**, arising under treaties between the empire and such foreign countries.' ✓

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This clause of the confederation act embodied no new principle, but merely conferred upon the dominion government the powers formerly exercisable by the several provinces in Canada. Thus, the Imperial statute 6 & 7 Vic. c. 76 (as amended by 8 & 9 Vic. c. 120), passed to give effect to the Ashburton treaty, while it

^p Am. Law Rev. v. 7, p. 187. 12 Vermont, 686. *People ex rel. Holmes v. Jennison*, 14 Peters, 540. *Barlow v. Curtis*, 50 New York Rep United States v. Davis, 2 Sum. 482, 321.

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expressly applies to the colonies in cases where no colonial legislation existed in reference to extradition, provides for the suspension of the act upon suitable provision being made by the Canadian legislature for carrying out the object of the same. And the operation of the Imperial act was suspended accordingly by an order of the Queen in council, upon the passing of an act on this subject by the legislature of the province of Canada in 1849.

V In June 1868 the Imperial statute was again suspended, upon the passing of a dominion act to enforce throughout the whole of Canada the objects contemplated by the aforesaid treaty.^a

In 1870 the Imperial law relating to the extradition of criminals was amended by the act 33 & 34 Vic. c. 52. This statute did not alter the Canadian law, but by its eighteenth section authorised the same to be carried into effect by an order in council to be issued pursuant to this act. But this applied only to Canadian legislation as aforesaid, for the purpose of carrying out the Ashburton treaty. As respects foreign countries other than the United States of America, any extradition treaties which extended to Canada (as hereinafter explained) had to be put into operation under the provisions of the Imperial act of 1870, as amended by the act 36 & 37 Vic. c. 60, passed in 1873.

Pursuant to the recommendation of the secretary of state, in a circular despatch dated January 11, 1877,^r in the colonies of Victoria, Queensland, South Australia and Tasmania, by local extradition acts, passed in 1877, the Imperial extradition acts of 1870 and 1873 were

^a Act 31 Vic. c. 94. This act was reserved, but subsequently assented to. For orders in council to give effect to the same, see Canadian orders in council, pp. 379, 380. The

act was amended, in respect to the classes of magistrates empowered to act under it, by 33 Vic. c. 25.

^r Queensland Leg. Coun. Jour. 1877, p. 279; *ib.* 1878, p. 119.

directed to be administered by conferring upon the colonial police magistrates the like powers and authorities for the surrender of fugitive criminals as are by the said acts vested in similar functionaries in the United Kingdom. These colonial statutes are enforced by the promulgation within the colony of an Imperial order in council, issued under the eighteenth section of the act of 1870, above mentioned. ✓

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For the dominion of Canada larger powers have been asserted, under the act of confederation. The Canadian privy council contend that the provisions of all extradition treaties entered into by Great Britain with foreign powers should be carried into effect in Canada by means of local legislation, pursuant to the one hundred and thirty-second section of the British North America Act, 1867, already cited in this connection. The practical advantages of such an arrangement are obvious and unquestionable, though difficulties arose, at first, in giving full effect to the same. ✓

After the passing of the Imperial act of 1870, two general measures on the subject of extradition were enacted by the Canadian parliament—one in 1873, the other in the following year. By these statutes it was proposed to apply to all other foreign states the provisions of the Canadian law, which had proved so effectual and convenient in the case of fugitives to or from the United States claimed under the Ashburton treaty. But these acts were not altogether approved by the law officers of the Crown in England; and, while not formally disallowed, they were not put in force by the issue of the necessary order of the Queen in council. The Canadian government acquiesced in the non-enforcement of these statutes. But in the event of a new and enlarged extradition treaty not being at an early date entered into between her Majesty's government and that of the United States, they reserved the right of

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✓ legislating upon the whole question of extradition so far as the interests of the dominion were concerned.

✓ In December 1875 the dominion government deputed the minister of justice (Mr. Blake) to confer with her Majesty's government upon this subject, and especially to consider the expediency of negotiating a more comprehensive extradition treaty.*

Winslow extradition case.

✓ About this time a misunderstanding arose between the British and the United States governments upon an application to the British government for the surrender of one E. D. Winslow, a fugitive from justice, charged with forgery. The British government declined to surrender this man unless they were assured that he should not be tried for any offence other than that for which he should be surrendered. This stipulation was in accordance with a clause in the Imperial act of 1870. But inasmuch as this condition appeared to be a restriction imposed by an Imperial statute only, and not enjoined either by the treaty of 1842 or by the American statutes passed to give effect thereto, the United States government refused to comply with it. A prolonged correspondence ensued, in which the American government adhered to their construction of the treaty, while the British government contended that the Imperial act of 1870 imposed no new condition upon the observance of the treaty, but merely declared the law that should regulate its administration. As neither party would give way, the operation of the treaty was suspended. The suspension continued for a year, when the British government consented to waive the point in dispute, and the treaty was revived; but with an understanding that negotiations should be entered into for

* Hon. Mr. Blake's letter to the secretary of state for the colonies, dated June 27, 1876, in Canada Sess. Pap. 1877, No. 13, pp. 10-18. For the previous correspondence referred to in the text, see *ib.* 1876, No. 49.

a more explicit treaty to regulate the extradition of criminals.^t Extradition.

The American courts were not unanimous in supporting the interpretation put upon the treaty by the United States government. In the case of the *United States v. Lawrence*, decided by the United States circuit court, southern district of New York, in 1876, the view held by the American government was upheld.^u But this construction was repudiated, and the view expressed by the British government approved, by the court of appeals of Kentucky, in April 1878, in the case of the *Commonwealth v. Hawes*.^v Spear, in his work on the law of extradition (Albany, 1879, Part I.), contains an able argument in support of the British contention. Canadian jurists have inclined the other way. Thus Judge Ramsay decided in the Court of Queen's Bench for Montreal, in February 1874, that so much of the Imperial Extradition Act of 1870 as was inconsistent with the Ashburton treaty of 1842 was not necessarily to be held as being in force in Canada, until, at least, an order of the Queen in council should be issued, under the fifth section of the said act, applying the act to a particular foreign state.^w

In 1876 the dominion government urged upon her Majesty's government the expediency of providing, in any new treaty or convention for the purpose of extradition, that special arrangements should be made for carrying out the same in Canada, by the direct action of the Canadian authorities. And, in the event of it being found impossible to conclude a new treaty with the United States, that the sanction of the Imperial government should be given to Canadian legislation upon the subject; such legislation to be reciprocal, if possible, but, if not attainable, then without reciprocity. This proposal was the more reasonable, inasmuch as the general principle of local legislation had, in reference

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^t See Clarke on Extradition, ed. 1874, c. 4. Kent, Inter. Law, by Abdy, 2nd ed. 1878, p. 117; Hans. D. v. 232, p. 250. Am. Rev. v. 136, p. 497; Decisions in Sup. Ct. of Ohio, 1883; Central Law Jour. v. 17, p. 287.

^u L. Can. Jurist, v. 18, p. 200.

^v Cox, Crim. Law, v. 13, p. 361.

^w 39 L. T. Rep. N.S. p. 80. U. States doctrine in this report, N. In Blake's letter, p. 21 (cited in note, opposite page).

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to the extradition of criminal offenders, been repeatedly recognised and applied in the case of various British colonies.^x

But the Canadian government did not lose sight of its claim to deal, by local legislation, with the general question of extradition.

✓ On April 10, 1877, the dominion house of commons agreed to a series of resolutions, upon which a joint address to the Queen was adopted, by both branches of the Canadian parliament, representing that, inasmuch as they possessed all the powers necessary for the purpose, they had passed a bill—which was afterwards assented to by the governor-general—to make provision by one Canadian law for the execution, as respects Canada, of all arrangements made between her Majesty the Queen and foreign states for the extradition of fugitive criminals; that, by the eighteenth section of the Imperial act of 1870, above mentioned, it being enacted that by order in council the provisions of any colonial law to provide within the colony for the surrender of fugitive criminals may be substituted for the clauses of the Imperial act to the same effect; that the provisions of the said Imperial act were unsuitable for Canada; that the Imperial parliament be invited to repeal these provisions; and that meanwhile her Majesty, by order in council, should suspend their operation, in order that the Canadian statute of 1877 (40 Vic. c. 25) may have force and effect, in lieu of the same.^y

In reply to this joint address, the governor-general was informed, by despatch from the colonial secretary, dated Feb. 5, 1878, that the Imperial government were not willing at present to suspend in Canada the operation of the Extradition Act of 1870, inasmuch as the

^x Hon. Mr. Blake's letter (before cited) of June 27, 1876, pp. 17, 18.

^y Can. Com. Jour. 1877, p. 238.

question of the extradition relations of the empire with foreign powers was under consideration by a royal commission.² Subsequently, on April 24, 1882, a despatch from the colonial office, dated Feb. 2, 1882, was laid before the senate of Canada, which explained the continued delay in giving effect to the Canadian statute. It appears that in March 1880, and again in January 1882, the Imperial government had been communicated with on the subject. In reply it was stated that before advising the issue of an order in council it was considered to be desirable that the dominion government should propose the repeal of certain clauses in the act which gave to the minister of justice too extensive powers to refuse the extradition of offenders; powers which might operate so as to constitute a breach of treaty obligations. Whereupon, on the advice of ministers, a bill was passed through parliament to amend the Extradition Act, 1877.^a

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Meanwhile, on May 30, 1878, the royal commission appointed to inquire into and consider the working and effect of the existing law and treaties relating to the extradition of persons accused of crime presented their report. They recommended that treaties for the surrender of criminal offenders to foreign powers should no longer be regarded as indispensable; but that, while the Crown should still retain the right to enter into such treaties, statutory power should be granted to the proper authorities to deliver up fugitive criminals, upon application, wherever such an arrangement could be made in a suitable manner, irrespective of the subsistence of any treaty between Great Britain and the state against whose law the offence had been committed, Imperial legislation or sanction being, of course, neces-

Imperial royal commission on law of extradition.

² Can. Com. Jour. 1878, p. 45.

^a Can. Stats. 1882, C. 20; Can. Sess. Pap. 1882, No. 160.

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sary to effect this change. The commissioners refrained from recommending any alteration in the existing law on this subject—at least, as regards the colonies.^b

In 1883 the Canadian government, by an approved report of a committee of the privy council, submitted to the Imperial authorities the desirability of extending the list of extraditable offences between Canada and the United States, so as to include all serious crimes, at the same time pointing out defects in the law, which brought the administration of the treaty into disrepute, in the case of certain fugitive criminals that had been extradited at the request of the United States government.^c In acknowledging the receipt of this document the secretary of state for the colonies stated that her Majesty's government was in communication with the government of the United States in regard to the question of negotiating a new extradition treaty.

Phelps-Rosebery convention.

As a result of these negotiations, on June 25, 1886, articles of a convention were signed at London between Great Britain and the United States, extending the provisions of the extradition treaty of 1842, so as to include four additional crimes not mentioned in it;^d but ratifications of this convention were not exchanged, owing to the treaty having been rejected by the United States senate.

The Weldon Act.

A widespread feeling of dissatisfaction having been aroused in Canada against criminals, more especially from the United States, making the country a harbour of refuge from the ends of justice, resulted in the introduction of a bill in the dominion parliament, in 1889, by a private member, Dr. Weldon, that provided for extradition, *irrespective* of any treaty, and which embraced twenty-two extraditable offences.

^b Com. Pap. 1878, v. 24, p. 903.

^c Correspondence between Imperial and Canadian governments on extradition. Can. Sess. Pap. 1885, No. 180.

^d Com. Pap. 1888, v. 109, p. 598.

The dominion government gave its support to the bill, chiefly to remove the inconvenience which had arisen from the absence of an effective extradition arrangement between her Majesty and the United States, through no fault of the Imperial government. In urging upon the colonial secretary the reasons why this act should be permitted to go into operation, the government pointed out that while Canada was apparently the first country to make the departure of adopting by legislation the principle of extradition irrespective of treaty; that in so doing the government was but carrying out a suggestion contained in a report of an Imperial royal commission (already noticed, *ante*, p. 283) that 'Statutory power should be given to the proper authorities to deliver up fugitive criminals whose surrender is asked for, irrespectively of the existence of any treaty between this country and the state against whose law the offence has been committed,'^e a suggestion that had likewise been advocated from time to time by eminent lawyers both in the United States and Canada; that special prominence was given to the question through the failure of the United States government to ratify the convention agreed upon by Lord Rosebery and Mr. Phelps; that the large influx of criminals from the United States, entering the border cities of Canada, who had merely to cross the line having a stretch of about 3,000 miles, fostered a most pernicious element in the country, and called for executive interference. Also that the dominion parliament, under the British North America Act, had the right to legislate on such a subject by virtue of the power given to it to make laws for the peace, order, and good government of Canada. But as the act under consider-

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^e Report of Royal Commission on Extradition, p. 1. Com. Pap. 1878, v. 24.

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ation involved international questions by conferring rights on foreign states in respect of persons resident in Canada, the attention of her Majesty's government was specially called to its provisions, and also, with the view that if the act should meet with the approval of her Majesty's government, that all nations with which her Majesty was in amity might be informed of it.

In reply, the dominion government was informed that an extradition treaty had recently been concluded between her Majesty's government and the United States which was waiting ratification; that on this and other grounds of general policy no steps would be taken to give effect to the act until her Majesty's government was able to give the matter full consideration.

In April of the following year (1890) a despatch was received from the colonial secretary stating that there was nothing in the act which rendered it necessary for her Majesty to withhold her assent; but it was desired that all communications with foreign powers, necessary under the fifth section of the act, requiring assurances that a person whose extradition is sought shall not be tried for any other offence than that for which his extradition is claimed, should pass through her Majesty's government, in order to avoid any possibility of Great Britain being involved in the event of a foreign country declining to fulfil the engagement. And in reply to the expressed wish of the Canadian government, that all nations with which her Majesty is in amity might be informed of the act, the colonial secretary stated that her Majesty's government considered there was no advantage in so doing, as the difficulties in the case of the United States had been removed by the ratification of a treaty with that country, since the passing of the act in question. Also, as to its application to other foreign countries, the government was informed that it would, in many cases, first necessitate

the modification of existing treaties ; but, if in the event, after mature consideration by both governments, of it being thought expedient to apply the act in the case of any particular country, her Majesty's government would be prepared to carry out the necessary steps to such an end.^f This gave entire satisfaction to the Canadian government, and the act now stands on the statute book awaiting, whenever occasion may arise, to be brought into force—according to its provisions—by proclamation of the governor-general.^g

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Act.

The following are extraditable offences under it :—

1. Murder, or attempt or conspiracy to murder.
2. Manslaughter.
3. Counterfeiting or altering money, and uttering counterfeit or altered money.
4. Forgery, counterfeiting or altering, or uttering what is forged, counterfeited or altered.
5. Larceny.
6. Embezzlement.
7. Obtaining money or goods or valuable securities by false pretences.
8. Rape.
9. Abduction, indecent assault.
10. Child stealing.
11. Kidnapping.
12. Burglary, housebreaking or shopbreaking.
13. Arson.
14. Robbery.
15. Fraud committed by a bailee, banker, agent, factor, trustee, or member or public officer of any company or municipal corporation, made criminal by any law for the time being in force.
16. Any malicious act done with intent to endanger persons in a railway train.
17. Piracy by municipal law or law of nations, committed on board of or against a vessel of a foreign state.
18. Criminal scuttling or destroying such a vessel at sea, whether on the high seas or on the great lakes of North America, or attempting or conspiring to do so.

^f Information received from the department of justice.

^g Can. Statutes, 1889, ch. 36.

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19. Assault on board such a vessel at sea, whether on the high seas or on the great lakes of North America, with intent to destroy life or to do grievous bodily harm.

20. Revolt, or conspiracy to revolt, by two or more persons on board such a vessel at sea, whether on the high seas or on the great lakes of North America, against the authority of the master.

21. Administering drugs or using instruments with intent to procure the miscarriage of a woman.

22. Any offence which is, in the case of the principal offender, included in any foregoing portion of this schedule, and for which the fugitive criminal, though not the principal, is liable to be tried or punished as if he were the principal.^b

Blaine-Pauncefote treaty.

Meanwhile, after so many futile attempts, as already stated, an extradition treaty supplementary to the tenth article of the treaty of 1842 had been ratified in London on March 11, 1890, between Great Britain and the United States, accomplishing—as it will be seen—the purpose of the Weldon Act as far as Canada and the United States are concerned.

The following are the extraditable crimes under it :—

1. Manslaughter, when voluntary.
2. Counterfeiting or altering money ; uttering or bringing into circulation counterfeit or altered money.
3. Embezzlement, larceny, receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.
4. Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.
5. Perjury, or subornation of perjury.
6. Rape, abduction, child-stealing, kidnapping.
7. Burglary, housebreaking or shopbreaking.
8. Piracy by the law of nations.

^b The Weldon Act is thus spoken of by an eminent American authority, Mr. J. B. Moore, in his work on Extradition, 2 vols. 8vo. Boston, 1891, v. 1, pp. 80, 627. 'The act, as it stands, may mark a distinct advance in the development of extradition, and is founded on correct principles.' This act breathes the

spirit of the declaration of Mr. Justice Osler, *in re Parker* (9 Ont. Prac. Rep. 332, 335), who, referring to extradition between Canada and the United States, said : 'For myself, I shall be glad to see the day when "free trade" in criminals shall exist.'

9. Revolt, or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master ; wrongfully sinking or destroying a vessel at sea, or attempting to do so ; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

Extradition treaty between Great Britain and U. States.

10. Crimes and offences against the laws of both countries for the suppression of slavery and slave-trading.

Extradition is also to take place for participation in any of the crimes mentioned in this convention, or in the tenth article of the treaty of August 9, 1842, provided such participation be punishable by the laws of both countries.

The crimes under the said tenth article are :—

1. Murder.
2. Assault with intent to commit murder.
3. Piracy.
4. Arson.
5. Robbery.
6. Forgery.
7. Utterance of forged paper.

The second and third articles of the treaty provide that :—

1. A fugitive criminal shall not be surrendered, if the offence in respect of which his surrender is demanded be one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try and punish him for an offence of a political character.

No person surrendered by either of the high contracting parties to the other shall be triable or tried, or be punished for any political crime or offence, or for any act connected therewith, committed previously to his extradition.

If any question shall arise as to whether a case comes within the provisions of this article, the decision of the authorities of the government in whose jurisdiction the fugitive shall be at the time shall be final.

2. No person surrendered by or to either of the contracting parties shall be triable or be tried for any crime or offence, committed prior to his extradition, other than the offence for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered. ✓

The Canadian act of 1877 (although amended in

Imperial
law of ex-
tradition;

Canadian
law.

1882 by Canadian statute, 45 Vic. c. 20 aforesaid) still remained in abeyance, and all extraditions in Canada, other than those which were carried out under the Ashburton treaty, continued to be conducted pursuant to the provisions of the Imperial statutes;ⁱ until, by order of the Queen in council, dated December 28, 1882, the operation of the Imperial extradition act of 1870, as far as it related to any foreign state, was suspended in Canada, so long as the dominion extradition act of 1877, aforesaid, and any act amending the same, should remain in force, and no longer.^j The acts of 1877 and 1882 having been consolidated as c. 142 of the revised statutes of Canada 1886, a further order of the Queen in council to the same effect, but relating to the last-named statute, was made on November 17, 1888.

✓ It will be seen, therefore, that with respect to procedure generally and the preliminary judicial investigation as to the criminality and identification of the fugitive (necessary under our system for giving effect to extradition treaties), recourse must be had to the Canadian act of 1877, as amended, being now c. 142 of the revised statutes of Canada.

✓ All extradition treaties entered into by the British government with any foreign state since 1870 have contained a clause in conformity with the provisions of the Imperial act of 1870, expressly stipulating that 'a person surrendered shall not be tried for any crime or offence committed in the other country before the extradition, other than the crime for which his surrender

ⁱ See *ante*, pp. 278-280; Clarke, Can. Crim. Law, ed. 1882; C. J. Dorion, Court of Queen's Bench, Quebec; L. C. Jurist, v. 22, p. 111; C. J. Harrison, Ont. Prac. Rep. v. 7, p. 275; C. J. Wilson, 31 U. C. C. P.

Rep. p. 491; Regina v. Browne, 6 Ont. App. Rep. p. 395; *in re Phipps*, *ib.* v. 8, p. 77.

^j See Dom. Gazette, March 3, 1883. And see *ex parte* Q. B. Montreal, 6 Legal News, p. 261.

has been granted.^k In addition to this principle it is a general rule as to extradition, that no person is to be surrendered for an offence which is one of a political character.¹

✓
Extradition.

All new extradition treaties negotiated between the British government and foreign powers are invariably made 'applicable to the colonies and foreign possessions of the two high contracting parties.' The requisition for the surrender of a fugitive criminal who has taken refuge in a colony is addressed to the governor, or chief executive officer thereof, through the chief consular officer of the power applying for the criminal. The governor disposes of the requisition in accordance with the provisions of the treaty. But he may either grant the surrender or refer the matter to the Imperial authorities. The British government usually reserves to itself the right to make special arrangements for the surrender of criminals from the colonies, conducting the same, as nearly as possible, in conformity with existing treaties.^m

✓
How applied to the colonies.

Here mention may appropriately be made of a case arising out of an extradition treaty between Great Britain and France, which gave rise to much correspondence, and led to a rebuke being administered by the secretary of state for the colonies to the governor-general of Canada, for his action in the matter:—

✓
Lamirande case.

In August 1866 one Lamirande was apprehended in Canada, on a charge of forgery committed in France, under a warrant issued by the governor-general, on the requisition of the French consul-general. Lamirande was committed to gaol, with a view to his

^k Canadian Orders in Council, pp. 381-409. Doutre, Const. of Canada, p. 364.

¹ For definition of 'political offence' see Stephen's Hist. of Crim. Law of Eng. ed. 1883, v. 2, p. 70.

^m For various extradition treaties, with the orders in council to give

effect thereto, see Canada orders in council, pp. 381-409. For later ones, see the prefix to Canada statutes of 1877, 1878, and 1879. For a list of all such treaties in force up to October, 1888, see Colonial Regulations, 1892, p. 329.

Extradition.

Lamirande case.

surrender, as a fugitive criminal, under the extradition treaty. But he applied for a writ of *habeas corpus*, in order that the validity of the proceedings against him might be determined by the Court of Queen's Bench at Montreal. While his case was still under consideration by the court, the governor-general, acting on the advice of the solicitor-general for Lower Canada, signed the warrant of extradition, which was promptly carried out; and Lamirande was delivered up to the agent of the French government. This appears to have been done in ignorance of the fact that the court was actually deliberating on the prisoner's case, and moreover with an idea that his legal rights would not be prejudiced by the issue of a warrant for his extradition. But, owing to some delay in the proceedings before the court, no order was made for the issue of the writ of *habeas corpus* until the day after Lamirande's surrender.

Nevertheless, the court continued to deliberate on the case, and decided that 'the pretended warrant of arrest, alleged to have been issued in France, and all the proceedings taken with a view to obtain the extradition of the petitioner, were unauthorised' by the Imperial statute passed to give effect to the extradition treaty with France, and were 'illegal, null and void, and that the prisoner was therefore entitled to his discharge.' But, as the judge went on to state, the prisoner 'is now probably on the high seas, swept away by one of the most audacious and successful attempts to frustrate the ends of justice which has yet been heard of in Canada.'

The governor-general (Lord Monck), in a series of despatches in answer to the request of the Imperial government, gave full explanations of the proceedings taken in this case, and assumed direct responsibility for the miscarriage of justice which had occurred. At the same time, he pointed out that the blame for what had happened ought to rest with those who, having charge of the prisoner's interests, had neglected to act with sufficient promptitude on his behalf.

In reply to these despatches, the colonial secretary, in a despatch dated Nov. 24, 1866, while giving the governor-general credit for the best intentions, rebuked him for his precipitancy in the matter, and for his neglecting to ascertain whether the prisoner was under the protection of the Queen's Bench before authorising his surrender to the French authorities. 'The omission to take this precaution has led to a most unfortunate abuse of your authority.' 'A great scandal has taken place, and an insult has been passed upon the dignity of the law, and the regular administration of justice in the Canadian courts.' 'I am obliged, therefore, with whatever reluctance, to express my decided disapproval of the course which your lordship was induced to adopt.'

With the conduct of the Canadian officers who had taken part in this transaction the colonial secretary was not concerned to deal. They 'are responsible to their superiors, and their superiors to the parliament, the constituencies, and the public opinion of Canada.' But 'the explanations hitherto afforded by your solicitor-general of his conduct in obtaining the warrant, whilst the case was actually under the hearing of the judge, would not have been deemed satisfactory by her Majesty's government.'

Extradition.

Subsequently, the British government made an official request to the French authorities for the surrender of Lamirande, on the ground that his extradition was unauthorised by the treaty of 1843, and the British statute confirming the same, inasmuch as the demand for his extradition had been irregularly preferred, and that the offence charged against him was not a crime contemplated by the treaty. The French government, however, demurred to these conclusions. At this juncture Lamirande himself made known to the Imperial government his desire to renounce all claim to be surrendered, and stated that he wished to remain in France to undergo the punishment awarded to him. As he had previously invited the interference of her Majesty's government on his behalf, this later request was duly communicated to the secretary of state for foreign affairs. Whereupon the British ambassador at Paris was instructed to state that her Majesty's government no longer insisted on their application for Lamirande's release; although 'their abstaining from doing so must not be construed into an admission on their part that there were not sufficient grounds for insisting upon it.'ⁿ

And thus this vexatious case was brought to an amicable conclusion, after exciting strong feeling in Canada, and endangering the good understanding between the governments of Great Britain and of France; perilous consequences which might have been avoided if the Canadian government had manifested a proper discretion and a due regard for private rights.

The naturalisation of aliens, and their release from the obligations they inherit as natural-born subjects in the country of their birth, is another matter which can only be effected by means of treaties or agreements between sovereign states. For it involves not merely a consideration of the terms and conditions on which the

✓
Naturalisation of aliens.

ⁿ Can. Sess. Pap. 1867-68, No. 50. And see Doutre, Const. of Canada, p. 365.

Naturalisation of
aliens.

state or country receiving immigrants from abroad may be disposed to grant them the privileges of citizenship, but also the conditions upon which the country of their birth may be willing to relinquish all further claim on their allegiance. It was a principle, formerly asserted not only by all European powers, but equally by the United States of America—at any rate up to the year 1868, when a declaration to the contrary effect was embodied in an act of congress, passed on July 27—that their subjects had no inherent right to expatriate themselves, and that a nation was entitled to the services of all its citizens, especially in time of war. By recent usage, however, individual transference of allegiance has become allowable, within certain limits. But even admitting a natural right in people to expatriate themselves at their discretion and to seek admission as citizens of other states, the best assurance to their native country of the reality and permanence of their change of domicile is undoubtedly the requirement of a prior residence of not less than five years, before naturalisation can be granted. This condition has commended itself to the approval and adoption of foreign nations generally, and, as a rule, is embodied in all treaties of naturalisation between foreign powers.*

In its bearing upon colonisation, the question of the naturalisation of aliens has given rise to much correspondence between the Imperial and colonial governments.

By the Imperial act 7 & 8 Vic. c. 66, passed in 1844, the secretary of state was empowered to grant certificates of naturalisation to aliens, which conferred

* See Hall, *International Law*, pp. 177, 190; Morse on *Citizenship*, Boston, 1881. Much difficulty has arisen in U. States owing to certain deviations from the generally ac-

cepted term of a 'five years' residence' prior to naturalisation having been authorised by congress. See *Int. Rev.* v. 11, p. 204.

upon them all the rights and capacities of British subjects, except in regard to certain political privileges. But this act was limited in its operation to the United Kingdom.

Accordingly, it became customary for naturalisation laws to be passed by the local legislatures, on behalf of aliens resident in the colonies; and, by the Imperial act 10 & 11 Vic. c. 83, passed in 1847, it was declared that all statutes heretofore passed by any colonial legislature in the Queen's dominions, for naturalising persons within the respective limits of such colonies, shall be valid and effectual therein, and likewise all future acts to the same purport, subject to confirmation or disallowance by her Majesty. But whenever aliens, so naturalised by colonial laws, pass beyond the limits of the particular colony, they lose all claim to be considered as British subjects.^p

Naturalisation laws.

When a naturalisation bill is proposed in any colony, the governor should ascertain whether his instructions do or do not require the insertion therein of a suspending clause. He should also take care that words are inserted in the terms of the statute, confining the privileges granted to the limits of the colony.^q

In 1865 the Imperial government enlarged the privileges of foreigners naturalised in any British colony by enabling them—under certain restrictions, and for a limited period—to obtain passports, signed by the governor, as ‘naturalised British subjects,’ which would afford to them protection for a certain specified time (generally one year only) when travelling abroad. But in 1882 the Imperial government, by a circular despatch from the colonial office, dated May 18, 1882, authorised the issue of passports, unlimited in point of duration, to aliens naturalised in a British colony, when travelling

^p See Earl Grey's Despatch of Sept. 25, 1847; Can. Leg. Assem. Jour. 1848, p. 42. The act 10 & 11

Vic. c. 83, was repealed and re-enacted by act 33 Vic. c. 14.

^q Col. Rules and Reg. 1892, c. 14.

Naturalisation
laws.

abroad, such passports to be issued by the colonial governor or by the Imperial foreign office; or provisionally by a British minister abroad.^r Such passports, however, confer on the bearer no claim to British protection in the country of their birth.^s

In 1870 an amended naturalisation act was passed by the Imperial parliament, which entitled aliens who had received certificates of naturalisation from the secretary of state (to be granted under certain specified conditions) to claim all political and other rights of British subjects, excepting that, when in the country of his birth, an alien should be liable to his original allegiance therein, 'unless he has ceased to be a subject of that state in pursuance of the laws thereof, or of a treaty to that effect.' And this act empowers naturalised aliens to divest themselves of their original status—and British subjects to renounce their allegiance to the British Crown, with a view to being naturalised in a foreign state—in any case where her Majesty has entered into a convention with a foreign state, for the purpose of giving effect to such a renunciation of allegiance. This act does not extend to the colonies.^t

German
emigrants
to Canada.

✓ The continued inconveniences and disabilities to which German emigrants to Canada are exposed by reason of the partial benefits afforded to them by naturalisation under the colonial law, which leaves them still liable to be claimed as German subjects when travelling abroad or on a return to their native country, induced the Canadian privy council to request the governor-general to write to the secretary of state for the colonies and represent this grievance. Accordingly, the Earl of Dufferin, on November 16, 1872, addressed

^r Can. Off. Gaz. Sept. 23, 1882;
Can. Stats. 1883, p. 12.

^s 33 Vic. c. 14; Queensland,
Leg. Coun. Jour. 1875, p. 861; Can.

^t See Can. Sess. Pap. 1867-68, orders in council, 1876, p. 72.
No. 74.

a despatch to the Earl of Kimberley on the subject, and requested that her Majesty's government would take measures to obtain for aliens naturalised in Canada precisely the same rights as those which are conferred by naturalisation in the United Kingdom. The receipt of this despatch was acknowledged; but no action was taken thereon by the British government.^u

Naturalisation of Germans in Canada.

Accordingly, on April 21, 1873, the Canadian house of commons passed an address to the Queen, praying that, pursuant to the provisions of the Imperial Naturalisation Act of 1870, above mentioned, her Majesty would be pleased to negotiate naturalisation treaties with the German and other foreign states, under which legally naturalised foreigners in Canada may no longer be subjected to the disabilities of a divided allegiance, but, on formally renouncing their native allegiance, may become entitled to all the privileges of native-born British subjects. ✓

A despatch in reply to this address, dated September 3, 1873, was transmitted by the governor-general to the house of commons, on May 6, 1874. It inclosed a memorandum from her Majesty's secretary of state for foreign affairs, which stated that the Imperial government were prepared to place aliens naturalised in any British colony, out of Europe, on the same footing, so far as passports and protection in foreign countries are concerned, as aliens naturalised in England under the act of 1870. But it suggested that a compliance with the request for the negotiation of naturalisation treaties would prove less advantageous to aliens naturalised in the colonies than the existing practice—inasmuch as no such treaties could be negotiated, except upon the basis of a five years' residence in the colony of the alien who desired to be allowed to change his ✓

^u Can. Sess. Pap. 1873, No. 66.

Naturalisation of
Germans
in Canada.

allegiance. The only way in which the objections urged could be satisfactorily overcome would be by an extension of Imperial naturalisation to the colonies, the expediency of which is under the consideration of her Majesty's government.^v

✓ No further Imperial legislation having taken place regarding naturalisation, in the meanwhile the Canadian house of commons, on April 5, 1875, again addressed her Majesty on the subject, representing that the extension of the Naturalisation Act of 1870 to the colonies would not meet the just expectations of the Germans and other naturalised foreigners in Canada, inasmuch as the passports granted under that act, though permanent, are expressly declared to be invalid in the state in which the individuals concerned were formerly subjects, the place of all others in which they desire to be protected in their acquired rights and privileges. The house, therefore, reiterated their request that her Majesty would be pleased to enter into a treaty with the German states (such as has been already negotiated between Great Britain and the United States, and between the United States of America and Germany), so that her Majesty's naturalised German subjects in Canada, after a residence therein of from three to five years (as may be agreed upon by the contracting powers) may become entitled to all the rights, privileges, and immunities of British subjects in any part of the world, and in as full a measure as if they were native-born British subjects.

In a despatch dated August 4, 1875, the colonial secretary acknowledged the receipt of the foregoing address; but intimated that her Majesty's government were unable, at present, to make any progress towards

^v Can. Sess. Pap. 1874, No. 54.

a compliance therewith, but would resume the consideration of the whole question hereafter.^w

Naturalisation of Germans in Canada.

In March 1879 the attention of the governor-general was directed to the matter, by a deputation of senators and members specially interested in the removal of the disabilities which continue to devolve upon German emigrants in Canada, and his excellency promised to bring the question under the notice of her Majesty's ministers.

And in March 1881 the Canadian commons were informed that negotiations had been entered into, between the Imperial and the German governments, with a view, by treaty, to enable German settlers in Canada to obtain complete naturalisation.^x

By the ninety-first section of the British North America Act, 1867, the dominion parliament is exclusively empowered to legislate upon 'naturalisation and aliens.' Accordingly, in 1881, an act respecting naturalisation and aliens was passed by the parliament of Canada, which provided that, thenceforth, no alien should be naturalised within Canada, except under the provisions thereof.^y It has been assumed by the Ontario and Manitoba legislatures that, whereas the ninety-second section of the act aforesaid empowers provincial legislatures to exclusively make laws concerning 'property and civil rights in the province,' these legislatures only are competent to authorise aliens to hold and transmit real estate.^z But the fourth section of the dominion act of 1881 expressly declares

Right of aliens to hold property in Canada.

^w Can. Com. Jour. 1876, p. 63.

^x Can. Com. Debates, 1881, p. 1340.

^y This act was not put into force by proclamation until June 30, 1883 (Can. Gaz. v. 17, p. 2), and an act was passed in the same year, 46 Vic. c. 31, legalising certain errone-

ous proceedings taken in Manitoba that had been executed under the presumption that it had been in force from the date of its passing.

^z Rev. Stats. Ontario, c. 97; Manitoba Stats. 1873 (37 Vic. c. 43).

Aliens in
Canada.

that 'real and personal property of every description may be taken, acquired, held and disposed of by an alien' in Canada, subject to certain restrictions, therein stated, it being understood that the concurrent rights of legislation in the several provinces are not thereby infringed.

Mention has already been made (*ante*, p. 187) of questions which have arisen in various British colonies from the influx therein of Chinese.

CHAPTER IX.

IMPERIAL DOMINION EXERCISABLE OVER SELF-GOVERNING
COLONIES: BY APPEALS TO THE COURTS OF LAW AND
TO THE PRIVY COUNCIL.

LEGISLATION by the Imperial parliament, as has been[✓] already pointed out, is not subject to be reviewed and annulled by any court of law within the realm. Parliament itself, in its collective capacity, is the highest court in the kingdom, and is necessarily the supreme judge of the proper limits of its own jurisdiction and powers; and it is not either constitutional or lawful for an inferior court to question the propriety or the discretion of any act done or passed by the Imperial parliament.^a

Supremacy of Imperial legislation.

Within the limits of every colony or province having representative institutions, the local legislature is invested with a similar supreme authority and jurisdiction,^b subject of course to the discretion of the Crown in assenting to or disallowing colonial enactments; and subject, moreover, to the determination of the question, whether the legislature has exceeded its competency, and the lawful bounds of its prescribed powers, on any given occasion. For the powers of every colonial legislature—in contradistinction to those[✓] of the Imperial parliament—are defined and limited, and are practically prescribed by a constitution which is written. All such constitutions must be interpreted

Plenary powers of local legislatures.

^a See *ante*, p. 244.

^b See *ante*, p. 242; *post*, p. 526.

by the judiciary, whose province and duty it is to expound and declare the law.^e

Their
legisla-
tion not
to be re-
pugnant
to Eng-
lish law.

It is the primary condition of all legislation by subordinate and provincial assemblies, throughout the British empire, that the same 'shall not be *repugnant* to the law of England.'^d This condition is enforced in two ways: firstly, as has been elsewhere shown, by the right and duty of the Crown to disallow any act that contravenes this principle;^e secondly, by the decision of the local judiciary in the colony, in the first instance, and ultimately of her Majesty's Imperial privy council, upon an action or suit at law, duly brought before such a tribunal, to declare and adjudge a colonial, dominion, or provincial statute, either in whole or in part, to be *ultra vires* and void, as being in excess of the jurisdiction conferred upon the legislature by which the same was enacted, or at variance with some Imperial law in force in the colony; or otherwise, by a similar decision, to confirm and approve of the legality of the act the validity of which had been impugned.^f

Interpre-
tation of
colonial
statutes
by the
courts.

The power of interpreting colonial statutes, and of deciding upon their constitutional effect and validity, is a common and inherent right, appertaining to all her Majesty's courts of law before which a question arising out of the same could be properly submitted for adjudication.^g This includes a jurisdiction to inquire whether acts done by an officer appointed by a colonial executive government, under the provisions of

^e See Story, Const. of U. States, sec. 1576. Tremenhoe, U. S. Constitution compared with our Own, ch. xv. (and see *post*, p. 537). *Blackwood v. The Queen*, L. T. Rep. N.S. v. 48, p. 441.

^d See *ante*, p. 166.

^e See *ante*, p. 171.

^f Mr. Secretary Cardwell, Hans. D. v. 185, p. 1320. And see the judgment of the privy council in the

Queen v. Burah, L. R. 3 App. Cas. 889. For other precedents of such judicial decisions, see *post*, p. 547.

^g O'Sullivan, Manual of Govt. in Canada, p. 132; and see Law Mag. for Aug. 1867, p. 287; *La Revue Critique*, &c., du Canada, Janvier, 1871, p. 117; *ib.* Janvier, 1872, p. 51; *ib.* Avril 1872 and Avril 1873; Com. Pap. 1847-48, v. 43, pp. 624-671; *ib.* 1849, v. 35, p. 57.

an Imperial statute, are in conformity with the authority intended to be conferred by that enactment.^h

In 1879, in the case of one F. Gleich, an absconding bankrupt from South Australia, the supreme court of New Zealand decided that the New Zealand Foreign Offenders' Apprehension Act, 1863, was *ultra vires*. This act was passed with a view to authorise the deportation of persons charged with indictable misdemeanours, committed in other Australian colonies, and their surrender to the authorities of the colony where the offence had been committed. Doubts were entertained at the time of its enactment in regard to the validity of this statute, but the home government took no steps to disallow it. But on the question being raised before the supreme court, it was adjudged that the colonial legislature had no power to authorise the conveyance on the high seas to another colony, and the detention outside its own jurisdiction, of any person whatsoever. Such power must be exercised—or expressly conferred on the local legislature—by Imperial enactment.

Precedents.

In notifying the secretary of state for the colonies of this judgment, the governor stated that his ministers hoped that the Imperial parliament would remedy the defect—as by an extension of the remedy already afforded—in the provision made for the apprehension in the United Kingdom or in other colonies of persons charged with felony, committed in a colony—by the Imperial act 6 & 7 Vic. c. 34; which is extended to places to which the Foreign Jurisdiction Act, 1843, applies, by 41 & 42 Vic. c. 67, sec. 3, sch. 1. Legislation to this effect had in fact been proposed by a circular despatch from Lord Carnarvon, dated December 6, 1876, but nothing had since been done in this direction.ⁱ Accordingly, in 1881, the Imperial parliament passed an act to amend the law with respect to fugitive offenders committing crimes in one part of the empire and absconding to another part, so as to facilitate, upon a uniform plan, their apprehension and trial (44 & 45 Vic. c. 69).

'The laws of a colony cannot extend beyond its territorial limits.'^j

^h Ouimet, Att.-Gen. v. J. H. Gray, 15 Lower Can. Jur. 306.

ⁱ Queensland Leg. Coun. Jour. 1877, p. 243 (with draft of an act and correspondence thereon); see also N. Z. House Jour. 1880, App. A. 1, p. 56; A. 6; *ib.* 1882, App. A. 1, pp. 2, 6; Canadian Corresp. by Mr. Blake, minister of justice, in 1877-78, Can. Sess. Pap. 1882, No. 40.

^j L. J. Turner, 1 L. R. Ch. App. 47; and see *ante*, p. 178; see Peek v. Shields, U. C. C. P. v. 31, p. 112. And the case of *Ld. Durham's* illegal ordinance enacted by the special council of Lower Canada in 1838, for the transportation of certain political offenders to Bermuda—which was disallowed by Imperial government and the transaction covered by an act of in-

Interpre-
tation of
colonial
laws by
the courts.

The Imperial parliament is subject to no such restraint or limitation.^k But jurisdiction is given by the Imperial acts (9 Geo. IV. c. 83, and 12 & 13 Vic. c. 96) to colonial courts to try certain offences committed beyond the jurisdiction of those courts: and by the act 37 & 38 Vic. c. 27, provision is made to regulate the sentences imposed upon conviction of such offenders.^l

In furtherance of the purposes of this enactment, and to vindicate at the same time Canadian autonomy, the parliament of Canada, in 1882, passed an act respecting fugitive offenders found in Canada who were accused of having committed offences in some other part of her Majesty's dominions, which is substantially a transcript of the English act, save only that the moment an offender is placed on shipboard for transportation to another colony the Imperial statute will become operative.^m

By a circular despatch, dated March 11, 1882, the Canadian government were informed of the procedure to be adopted in order to carry out the 'Fugitive Offenders Act.'ⁿ

The judicial committee of the privy council decided, in 1882, on appeal from the supreme court of Victoria, that an act of the colony, concerning duties on estates of deceased persons, did not extend to personal estate or property locally situated outside the colony, and was therefore beyond the jurisdiction of the Victorian legislature.^o

We have elsewhere (*post*, pp. 547-575) discussed this subject at considerable length, in connection with legislation in the several provinces of the dominion of Canada, as well as in respect to legislation by the dominion parliament: it is unnecessary therefore to enlarge upon the question any further in this section; and we may proceed to show the extent and method of control which is still exercised by the Crown over all

demnity passed by the Imperial parliament. *Mirror of Parl.* 1838, pp. 5907, 6151, 6186, act 1 & 2 Vic. c. 112.

^k See *ante*, p. 245.

^l See Queensland Leg. Coun. Jour. 1875, p. 883; and see Forsyth, *Const. Cases*, c. vii.; see also *ante*, p. 239.

^m See Can. Sess. Pap. 1882, No.

40; Can. Debates, 1882, p. 1259; Can. Stat. 45 Vic. c. 21.

ⁿ Can. Gazette, Jan. 5, 1883; see *Kirchner, Law and Practice concerning Fugitive Offenders*, London, 1882; and *Stephen, Crim. Proc.* London, 1883, part iv.

^o *Blackwood v. The Queen*, L. T. Rep. N.S. v. 48, p. 441.

the colonies and dependencies of the empire, through the instrumentality of the privy council.

The sovereign, as the fountain of justice, is constitutionally empowered to receive petitions and appeals from all ~~hes~~ colonies and possessions abroad, upon whatever regulations and conditions may be defined and imposed by the authority of the Crown in council.^p

Appeals
to the
Crown in
council.

Such petitions or appeals are referred to the consideration either of the judicial committee of the privy council, or of some other committee of that body, upon whose report the decision of the sovereign is pronounced. The reference may be made either upon an appeal from an inferior colonial court, or on a petition or claim of right, or on a petition praying for the redress of a grievance that is not within the prescribed jurisdiction of other courts or departments of state, but which the Crown is willing to entertain.^q It is not the duty of the governor of a colony to transmit to the secretary of state an application of this description from parties in a private suit, but the same should be brought before the lords of the council by a professional agent, in the customary way.^r

If the matter of grievance or complaint be one that is properly cognisable by a legal tribunal, it would be referred to the judicial committee of the privy council, which, by the act 3 & 4 Will. IV. c. 41, in addition to its ordinary functions as a court of appeal from inferior courts of law, is empowered (by sec. 4) to consider 'any matters whatsoever' that the Crown shall think fit to refer to it.^s It has, however, been decided that this clause will not justify a reference to the judi-

Judicial
commit-
tee of the
privy
council.

^p Stat. 24 Hen. VIII. c. 12; 25 Hen. VIII. c. 19, sec. 4. And see *post*, p. 417.

^q Stephen, *New Comm.* ed. 1874, v. 2, p. 461; *Regina v. Bertrand*, P. C. App. v. 1, p. 520. And see

Canada Assem. Jour. 1861, p. 176.

^r Queensland Leg. Coun. Jour. 1875, p. 879.

^s Todd, *Parl. Govt.* v. 2, p. 624, new ed. v. 2, p. 677. Finlason, *History, Constitution, and Character*

Judicial
com-
mittee of
the privy
council.

cial committee of anything whatever that could not be properly entertained by, or come before, the Crown in council. For example, this committee could not advise upon questions of general or political policy, for that is the especial province of the cabinet council; neither could it advise in criminal matters, in which, except in certain colonial cases, no appeal to the privy council is allowed by law.^t

But the Crown may, by its prerogative, review the decisions of all colonial courts, criminal as well as civil, unless this prerogative has been expressly annulled by charter or statute, though an appeal, in a criminal case, is rarely entertained by the privy council.^u

With a view to increase the efficiency of the judicial committee, it is customary to summon to the privy council judges and men of eminence in every branch of legal study, expressly that they may assist at the deliberations of the same.^v And in 1871, by the act 34 & 35 Vic. c. 91, four additional paid judges were added to the judicial committee for the like purpose. By the Supreme Court of Judicature Act, 1873, sec. 21, her Majesty in council was empowered to transfer the jurisdiction of the judicial committee to the new court of appeals created by that statute. But by the amending act of 1875, the operation of this section was suspended; and, by the twenty-fourth section of the Appellate Jurisdiction Act of 1876, it was repealed, and new provisions enacted to maintain the existence of

of the Judicial Committee of the Privy Council, London, 1878. For examples of such references, see Can. Leg. Ass. Jour. 1852-53, App. T.T.T.T. No. 12, and in 1878, on receipt of special case agreed upon by local governments of Ontario and Quebec, touching validity of an award by two arbitrators under 142 section of British N. Am. Act, 1867, the third arbitrator having resigned after hearing and before decision,

the same was referred to the judicial committee, under sec. 4 of act 3 & 4 Will. IV. c. 41, decided upon and the decision ratified by the Queen in council. See Ontario Sess. Pap. 1878, No. 42.

^t Hans. D. v. 209, pp. 977, 984.

^u Forsyth, Const. Law. p. 379; Macpherson, P. C. Prac. ed. 1873, p. 60.

^v Todd, Parl. Govt. v. 2, p. 625, new ed. v. 2, p. 680.

the judicial committee of the privy council, and to strengthen the point of connection between that body and the house of lords, as the ultimate courts of appeal for the British empire.^w

The appellate jurisdiction of the Queen in council is ^{Beneficial effects of Imperial appellate jurisdiction.} retained for the benefit of the colonies, not for that of the mother country. It secures to every British subject a right to claim redress of grievances from the throne. 1 It provides a remedy in certain cases not falling within the jurisdiction of ordinary courts of justice 2 it removes causes from the influence of local prepossessions 3 it affords the means of maintaining the uniformity of the law of England in those colonies which derive the great body of their law from Great Britain; and it enables suitors, if they think fit, to obtain a decision in the last resort from the highest judicial authority and legal capacity existing in the metropolis. It is true that in a colony which possesses an efficient court of appeal, it may be seldom necessary to have recourse to this supreme tribunal. Nevertheless its controlling power, though dormant and rarely invoked, is felt by every judge in the empire, because he knows that his decisions are liable to be submitted to it. Under such circumstances, it is not surprising that British colonists have uniformly exhibited a strong desire not to part with the right of appeal from colonial courts to the Queen in council.^x

Since the establishment of responsible government in the principal British colonies, the supreme interpretation and application of the law upon appeal to the mother country has become almost the sole remaining power exercised through the Crown over the self-govern-

^w Charley's Judicature Acts, 3rd ed. 1877, pp. 32, 1014. appellate jurisdiction, 1872, pp. 17, 34. And see Chalmers's Political

^x Evidence of Mr. Henry Reeve, before the lords' committee on Annals, pp. 304, 671, 687.

Right of
appeal
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ing dependencies of the realm, even in those colonies which have been entrusted with the largest measure of local self-government. While ample powers have been granted, by the Imperial parliament, to every colonial legislature to establish, to abolish, and to reconstitute courts of judicature, and to provide for the administration of justice in the colony,^y the right of appeal to the privy council continues everywhere to be maintained, and is usually regarded with profound respect and appreciation.^z

✓ This is, moreover, one of the rights of the subject with which the Crown, by its mere prerogative, cannot interfere; for the Crown has no power to deprive the subject of any of his rights. Although acting with the other branches of the legislature, the Crown is enabled to exercise this power in any part of the realm.^a

Supreme
court of
Canada.

Thus, by the act passed by the parliament of Canada, in 1875, 'to establish a supreme court, and a court of exchequer, for the dominion of Canada,' it is enacted that an appeal shall lie to the supreme court from all final judgments of the highest court of final resort, now or hereafter to be established in any province of Canada. It is also declared that 'the judgment of the supreme court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the supreme court to any court of appeal established by the parliament of Great Britain and Ireland, by which appeals or petitions to her Majesty in council may be ordered to be heard: saving any right which her Majesty may be graciously pleased to exercise by virtue of her royal prerogative.'^b

^y 28 & 29 Vic. c. 63, sec. 5.

^z See *Hans. D. v. 202*, p. 1284; *v. 208*, p. 930; and see cases cited in *Doutre*, *Const. of Canada*, pp. 339-347.

^a *Cuvillier v. Aylwin*, 2 Knapp,

78.

^b *Can. Act*, 38 Vic. c. 11, sec. 47. See amending acts of 39 Vic. c. 26; 42 Vic. c. 39; 43 Vic. c. 34;

This act does not deprive the subject in Canada of the right to appeal from a judgment of the highest provincial court of last resort (court of Queen's bench, or court of review) direct to the Queen in council, where such right of appeal has not been lawfully restrained by statute. Thus, in Canada, appeals are permitted only where the sum in dispute exceeds £500 sterling (in Lower Canada), or four thousand dollars in Ontario, except in certain specified cases. Under such circumstances appellants have the choice of carrying their suit for final determination either to the supreme court of Canada, or to the judicial committee of the privy council.^c

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appeal to
privy
council.

It has since been decided by the judicial committee, in the case of *St. Andrew's church, Montreal*, that, notwithstanding the foregoing statute, they are competent, in any proper case, to advise her Majesty to allow an appeal to the privy council from a judgment of the supreme court of Canada, or any other court of last resort therein.

In 1878, the court of Queen's bench at Montreal decided, in the case of the *City of Montreal v. Devlin*, that leave to appeal to the privy council from a judgment of the court of Queen's bench, Quebec, must be granted upon the application of one party to the suit, notwithstanding that the adverse party had previously obtained leave, on application to another judge in chambers, to appeal from the same judgment to the supreme court of Canada. Whatever might be the inconveniences resulting from the allowing in the same case of a double appeal to two separate tribunals, whose decisions are each held by law to be supreme and final, the court could not refuse to grant the appeal to the privy council, being equally bound so to do by the precise text of the law, as was the

50-51 Vic. c. 16; 51 Vic. c. 37; 52 Vic. c. 37; 53 Vic. c. 35; 54-55 Vic. c. 25.

^c *De Gaspe et al. v. Bessener et al.*, L. T. Rep. N. S. v. 39, p. 550. For the practice regulating appeals in Lower Canada, see *Foran's Code of Civil Procedure*, p. 577; and in

Upper Canada, see *Taylor & Ewart, Judicature Act, 1881*, p. 87; and see *Cuehing v. Dupuy* to the same effect, that the prerogative of the Crown cannot be taken away by implication. L. T. Rep. N. S. v. 42, p. 445.

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to privy
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judge in chambers to allow the appeal sought for to the supreme court.^d In this particular case, however, the parties to the suit finally came to a compromise, so that neither appeal was prosecuted.^e

'This double appeal, which exists as a matter of statutory right, may seem an anomaly, but in practice no difficulty has resulted from it. The statement that the judgment of the supreme court of Canada is final is subject to some qualification. As has been said, the section of the supreme and exchequer courts act which declares that the judgment of the supreme court shall be final, also says, "saving any right which her Majesty may be graciously pleased to exercise by virtue of her royal prerogative;" and an appeal may be allowed to the privy council from the judgment of the supreme court of Canada (except in criminal appeals, and also election appeals, as will be seen hereafter), and in fact many such appeals have been allowed, not as a matter of statutory right, but of grace. The exercise of the prerogative in this direction would therefore prevent any evil which might be threatened from conflicting judgments. Further, it may reasonably be assumed that in the event of concurrent appeals being taken the supreme court would withhold its decision pending the result of the appeal to the privy council.'^f

In 1876 the judicial committee decided that an act of the Quebec legislature transferring the right of trying election petitions from the legislative assembly of the province to the judges of the superior court, which declared that 'such judgment shall not be susceptible of appeal,' did not thereby infringe on the prerogative, right of the Crown to hear appeals; which right cannot be taken away by any statute, except by express words. But from the peculiar nature of this particular act, to which the Crown had assented and which affected the rights and privileges appertaining to the legislative assembly independent of the Crown, it was evident that it could not have been the intention of the legislature to

^d L. Can. Jurist, v. 22, p. 136.

^e St. Andrew's church, Montreal, v. Johnston, L. R. App. Cases, v. 3, p. 159; L. T. Rep. N. S. v. 37, p. 556; Doutre, Const. of Can. p. 341.

^f Memorandum from Mr. R.

Cassels, registrar of the supreme court of Canada. *Vide* also Cassels's Practice Supreme Court of Canada, pp. 56, 57, 75, 76, 8vo. Toronto, 1888.

have created a tribunal which should be liable to have its decisions reviewed upon an appeal to the Crown, under its prerogative.^g

Appeals to privy council limited.

The same principle was laid down in an appeal from the supreme court of Canada in the Glengarry election case, *Kennedy v. Purcell*. 'Their lordships,' says the judgment, 'do not find it necessary to give any decision on the abstract question of the existence of the prerogative in this case, because they are satisfied that if it exists it ought not to be exerted in the case before them.'^h

Again, the lords of the council—in their judgment on June 24, 1882, in the case of the Bank of New Brunswick *v. McLeod*—have stated their reasons for discountenancing appeals from Canadian courts, pursuant to the expressed wishes of the dominion parliament, except as an act of grace, and to be exercised only in cases of general interest and importance, irrespective of the opinions of their lordships in the matter of law, or as to the findings of the facts of the case by Canadian courts.ⁱ

And their lordships will not advise the admission of an appeal from the supreme court save where the case is one of gravity, involving matter of public interest, or some important question of law, or affecting property of considerable amount.^j Nor will they allow an appeal where the only issue raised is one of fact. Parties petitioning for leave to appeal must state succinctly, but fully, the grounds upon which they make their application; and must afterwards confine their proceedings to those grounds.^k

In order to ratify by the authority of parliament

^g *Théberge v. Landry*, L. R. App. v. 2, p. 102; L. T. Rep. N. S. v. 35, p. 640. See also *Wellington Election Case*, 44 U. C. Q. B. 132.

^h 59 L. T. N. S. p. 281.

ⁱ *Can. Legal News*, v. 5, p. 401.

^j *Prince v. Gagnon*, 8 L. R. App. Cas. 103.

^k *Canada Cent. Ry. Co. v. Murray*, *ib.* p. 574.

Appeals
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council.

the principle asserted in the case of St. Andrew's church, Montreal, above cited, that no British subject throughout the Queen's dominions shall be deprived of the liberty of appeal to the privy council, it was provided in the fifty-first section of the South Africa Union Act, 1877, that no act of the union parliament shall be construed to abridge the right of appeal to the Queen in council from any judgment of the general court of appeal to be hereafter established in South Africa.

But so far as Canada is concerned the right of appeal to the Queen in council in criminal cases has been abolished, and the judgment of the supreme court of Canada made absolutely final by 'an act further to amend the law respecting procedure in criminal cases,' which substitutes for sub-section 5 of section 1 of 50 & 51 Vic. c. 50, the following provisions:—

'Notwithstanding any royal prerogative . . . no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority by which in the United Kingdom appeals or petitions to her Majesty in council may be heard.'¹

¹ Stat. Canada, 51 Vic. c. 48, sec. 5.

An appeal from Canadian supreme
Court to King in Council in
important civil cases.
No appeal in criminal case.

CHAPTER X.

IMPERIAL DOMINION EXERCISABLE OVER SELF-GOVERNING
COLONIES: BY THE GRANT OF HONOURS AND TITULAR
DISTINCTIONS IN THE COLONIES.

HAVING passed under review the use and control of the various prerogatives of the Crown that are incidental to the ordinary administration of government in a limited monarchy, we have next to consider certain extraordinary prerogatives appertaining to the sovereign, which are exceptional in their nature and personal in their exercise, and which, accordingly, are not transmissible from the Crown by any general delegation, but are only confided as a matter of high trust to certain eminent public functionaries who are specially commissioned by the sovereign to administer the same. These are, firstly, the prerogative wherein the sovereign acts as the fountain of honour; secondly, the prerogative of mercy. These prerogatives, from their especial characteristics, are not included in the ordinary delegation of powers to a governor or a lieutenant-governor, but are either reserved for the exercise of the sovereign directly, or are administered by a viceroy or governor-general by express delegation to him as the Queen's representative.^a

Honours
and dis-
tinctions.

^a Earl of Carnarvon's Despatch to Governor Robinson, of New South Wales, Oct. 7, 1874, in Com. Pap. 1875, v. 53, p. 677. And see Sir John A. Macdonald's memorandum as minister of justice, dated Jan. 3, 1872, to the governor-general of Canada, Canada Sess. Pap. 1877, No. 89, p. 332.

Prerogative of honour.

It is a constitutional principle of great importance that all honours conferred upon individuals in any part of the empire should emanate from the highest source of authority and dignity.

No British subject is at liberty to accept and wear any foreign order, decoration, or medal without express license from the Crown. Such leave is never granted unless it is intended to reward active and distinguished service against an enemy, or actual employment in the service of the sovereign conferring the distinction, or attendance upon a foreign sovereign to convey to him an order from the British monarch. The rules governing the practice in such cases were established by Lord Castlereagh in 1812, and were revised in 1870. They are strictly maintained, although they may not be capable of being legally enforced.^b

Honorary distinctions should be bestowed, as far as possible, by the spontaneous action of the sovereign, and not necessarily or exclusively at the instigation of others. Nevertheless, this prerogative, like every other function of royalty, must be exercised with the concurrence and upon the responsibility of ministers; and recommendations in respect to the same are suitably tendered to the sovereign by the prime minister.^c

How administered in the colonies.

In regard to the distribution of honours in the colonies, Lord Elgin, when governor-general of Canada in 1853, wrote to the colonial secretary (the Duke of Newcastle) as follows: 'Now that the bonds formed by commercial protection and the disposal of local offices are severed, it is very desirable that the prerogative of the Crown, as the fountain of honour, should be employed, in so far as this can properly be done, as a means of

^b See Queen Victoria's letter to Emperor Napoleon, in Martin's *Pr. Consort*, v. 3, p. 472; *ib.* v. 5, pp. 392, 394; *L. T. Nov.* 9, 1878, p. 19; Wellington's *Desp.* 3rd ser. v. 5, pp. 321, 406; Earl of Derby, *Hans. D.* v. 229, p. 1265. For regulations in question, see Official Foreign Office List.

^c Todd, *Parl. Govt.* v. 1, pp. 366, new ed. p. 589; *Hans. D.* v. 192, p. 1813; v. 193, p. 1835; v. 223, p. 975. And see Martin, *Life of the Prince Consort*, v. 3, p. 478; Torrens, *Life of Melbourne*, v. 2, p. 169; Wellington's *Despatches*, 3rd series, v. 7, pp. 180, 366.

attaching the outlying parts of the empire to the throne.' 'As a general rule, Imperial honours should appear to emanate directly from the Crown, on the advice, if you will, of the governors and Imperial ministers, but not on the recommendation of the local executives.'^d

Confer-
ring
honours.

In 1880, upon the recommendation of the governor, and at the suggestion of his first minister, the dignity of knighthood was conferred upon the speaker of the house of representatives of New Zealand. Upon the house receiving official information of this occurrence, the speaker received congratulations. Afterwards, in committee of supply, on motion of the premier, 100*l.* was voted to defray the usual charges on the patent.^e

In 1869, after the successful termination of the Maori war, the New Zealand minister advised the governor (Sir George Bowen) that it was desirable to confer some decorative distinction upon the officers and men of the colonial forces engaged therein, who had been conspicuous for bravery. Recognising the Queen as being 'the fountain of honour,' who could alone institute orders of merit, or bestow distinctions of Imperial value, the government nevertheless proposed this decoration as 'a local honour,' such as had been repeatedly given in colonies as prizes for rifle shooting, or awarded by a geographical or humane society. The governor accepted this advice, and on March 10, 1869, agreed to an order in council, to confer the 'New Zealand Silver Cross' as a decorative distinction upon deserving persons, under certain regulations. He afterwards reported the matter to the secretary of state, adding that, thus far, five persons only had received this honour.

Earl Granville acknowledged this information in October 1869. In his despatch he remarked that Sir G. Bowen had overstepped the limits of his authority in approving of this matter, inasmuch as the authority inherent in the Queen, as the fountain of honour, had not been delegated to him. Nevertheless, 'under the very exceptional circumstances of the colony,' her Majesty had been pleased to sanction the order, from its original date, by her direct authority, but the act was not to be drawn into precedent in any colony.^f

^d Walrond, Letters of Lord Elgin, p. 114. And see *post*, p. 329.

^e N. Zealand Parl. Deb. v. 35, pp. 148, 182; v. 36, p. 482. In preceding twenty-five years, four gentlemen had occupied the speaker's chair in this colony, each of whom had received the honour of knighthood.

N. Z. House Jour. 1880, App. A. 1, a.

^f N. Zeal. House Jour. 1870. App. A. No. 1, pp. 17, 18, 72; *ib.*

Prece-
dence.

This principle has been generally recognised in the exercise of this prerogative in the colonies. Rules and regulations in regard to honours and tables of precedence, and decisions to determine controverted questions arising out of the same, are communicated to colonial governors by her Majesty's secretary of state for the colonies.

By order of council of July 18, 1849—pursuant to a report of the lords of the privy council—precedence was given to Mr. Justice Bedard on his transference from the court of Queen's bench of the district of Quebec to that of Montreal, thereby annulling an order of the court of Queen's bench of Montreal, which assigned this judge a position below two other puisne judges of the court, on the plea that they were his seniors on this bench, although his commission as a judge was of older date than their own; notwithstanding that the Crown had, by letters patent issued on his transference to this court, given to Judge Bedard the precedence to which, by the date of his commission and by the custom of courts, he was entitled to claim.^g

Prece-
dence in
the colo-
nies.

In the absence of and subject to any Imperial or colonial enactment, or any royal declaration or instructions decisive of or bearing on the question, the precedence to be given to British subjects resident in any colony must be determined by the governor, as representing the Crown in its character of the fountain of honour.

The sixth chapter of the 'Official Rules and Regulations for her Majesty's Colonial Service' (edition 1892) deals with this question, and treats of precedence, the conferring of the decoration of 'the Victoria cross,'

A. 1, a, p. 8. For new rules recognising the Queen as the source and authority for honorary distinctions, whilst admitting 'medals awarded by a society for bravery in saving

human life' to be worn, see Regulations for the Volunteer Force, N. Zeal. Parl. Pap. 1882, H. 10, p. 25.

^g Moore, P. C. C. v. 7, p. 23.

flags of official personages, military and naval salutes, and colonial uniforms. In regard to precedence of colonial officers, it is stated that this is, in some cases, regulated by colonial enactments, to which the Crown must necessarily have assented by royal charters, by instructions communicated either under the royal signet and sign-manual through the secretary of state, or by authoritative usage. In the absence of any such special authority, governors are directed to guide themselves by the subjoined table. It may be serviceable in this connection to compare the general official table of precedence with the special table for use within the dominion of Canada, which was transmitted by the Queen's command, after having received her Majesty's approval, to the governor-general of Canada on July 23, 1868, and was published in the dominion official gazette, pointing out at the same time any variations between the two tables arising out of the altered circumstances of Canada under the British North America Act of 1867, and any additional regulations since received on the same subject.

Precedence.

<i>General Table of Colonial Precedence.^h</i>	<i>Table of Precedence for Canada.ⁱ</i>	Prece- dence in Canada and in othercolo- nies com- pared.
<ol style="list-style-type: none"> 1. The governor, lieutenant-governor, or officer administering the government. 2. The senior officer in command of the troops, if of the rank of general, and the officer in command of her Majesty's naval forces on the station, if of the rank of an admiral, their own relative rank being determined by the Queen's regulations on that subject. 	<ol style="list-style-type: none"> 1. The governor-general, or officer administering the government. 2. The same as in the general table. 3-6. The lieutenant-governor of the several provinces of Ontario, of Quebec, of Nova Scotia, and of 	

^h C. O. List, 1891, p. 343.ⁱ For last revised table of procedure for Canada, issued by Im-

perial authority, see Dominion Gazette, Feb. 21, 1880.

Precedence.

3. The bishop [or bishops, of all denominations, according to date of consecration].^j

- New Brunswick. [And in their appropriate order, the lieutenant-governors of provinces afterwards added to the dominion.]
7. Archbishops and bishops, according to seniority [of consecration.]
8. Members of the cabinet, according to seniority.^k
9. The speaker of the senate.

^j Before the removal of Roman Catholic disabilities by the Imperial parliament, prelates of the Roman Catholic church in the British colonies were not usually addressed by the title to which their rank in their own church entitled them. But on Nov. 20, 1847 (parliament having by a recent act formally recognised the rank of the Irish Roman Catholic prelates, by giving them precedence immediately after prelates of the established church of the same degree), a circular despatch was addressed to colonial governors by Earl Grey, authorising the Roman Catholic prelates to be officially addressed by the title of 'your grace' or 'your lordship,' as the case may be. This despatch was understood as authorising the precedence of Roman Catholic church dignitaries to follow immediately after Anglican dignitaries of the same order and degree. It was afterwards qualified, to some extent, by a circular despatch from the Duke of Newcastle, dated May 3, 1860, which simply recognised as of 'the episcopate' all chief officers of the Roman church, and assigned them positions next after 'the episcopate which derives its rank from the Queen's letters patent.' This despatch further provided that 'the dignities' of metropolitan, archbishop, or (it may be) patriarch, should only be recognised by her Majesty's officers when admitted by bishops of each communion as regulating their precedence *inter se*' (South Australia Parl. Proc. 1871,

App. No. 115). Consequent upon a judgment of the privy council in 1865, in the case of Bishop Colenso of Natal—that while the sovereign had undoubted right, by virtue of her prerogative, to give style, title, dignity, and precedence in all parts of her dominions, she had no power to issue letters patent professing to create episcopal sees, &c., in colonies possessing representative institutions—the home government resolved to refrain henceforth from issuing letters patent to bishops in such colonies. (Todd, Parl. Govt. v. 1, pp. 310–312, new ed. v. 1, p. 508.) This destroyed the last vestige of state superiority in Anglican bishops in the colonies, over bishops of other communions. It has since been determined that no colonial bishop 'is entitled to any territorial designation, nor to be addressed as lord bishop,' and that 'bishops of different denominations should rank *inter se* according to the date of consecration.' Lord Kimberley's despatch of Sept. 30, 1881.¹

^k Special precedence is assigned to 'cabinet ministers' in Canada, because they form part (under the British North America Act, 1867, sec. 11) of the Queen's privy council for Canada. In England all privy councillors have precedence of legal functionaries except of the lord high chancellor, who is always a privy councillor. See Dodd, Manual of Dignities, pp. 50, 51.

¹ Com. Pap. 1882, v. 46, p. 631.

4. The chief justice.¹

5. The senior officer in command of the troops, if of the rank of colonel or lieutenant-colonel, and the officer in command of her Majesty's naval forces on the station, if of equivalent rank; their own relative rank being determined by the Queen's regulations.

6. The members of the executive council.^p10. The chief justice of the supreme court of Canada.^m Precedence.11. The chief judges of the courts of law and equity, according to seniority.ⁿ

12. Members of the privy council not of the cabinet.

13. General officers of her Majesty's army serving in the dominion, and officers of the rank of admiral in the royal navy, serving on the British North American station, not being in the chief command; the relative rank of such officers to be determined by the Queen's regulations.^o

¹ This is in conformity with the English table of precedence, which places the highest legal functionary (the lord chancellor) next after the highest ecclesiastical officer (the archbishop of Canterbury), and before the lord president of the privy council. Dodd, *Manual of Dignities*, pp. 31-33.

^m The secretary of state for the colonies (Sir M. Hicks-Beach), in a despatch dated Oct. 31, 1878, approved of an arrangement made by the governor-general of Canada, under which all judges of the supreme court took precedence next after the speaker of the senate (*Canada Dominion Gazette*, Dec. 14, 1878). But by a later despatch to the governor-general of Canada, dated Nov. 3, 1879 (*ib.* Nov. 22, 1879, and Feb. 21, 1880), the chief-justices of the several superior courts of law and equity in the different provinces of the dominion are to take rank next after the chief-justice of the supreme court of Canada; and the puisne judges of the said supreme court next before the puisne judges of the several provincial superior courts.

ⁿ In *Can. Off. Gaz.* Oct. 22, 1881, there is a table of precedence for judges of supreme court of judicature for Ontario in Canada, and as between themselves. This follows upon the reorganisation of the court under the new judicature act.

^o By the Canada militia acts of 1868 and 1875, the officer in command of the dominion militia shall have the rank of major-general in the militia of Canada; and the adjutant-general at headquarters the rank of colonel in the militia. Officers of her Majesty's regular army shall always be reckoned senior to militia officers of the same rank, whatever be the dates of their respective commissions. The relative rank and authority of officers in the militia shall be the same as that in the regular army. By a circular despatch from the secretary of state for the colonies to colonial governors, dated March 17, 1879, revised regulations are promulgated with regard to the interchange of visits between officers of her Majesty's ships and governors, lieutenant-governors, administrators, and presidents of colonies. Under the new regulations provision has been made for paying and returning visits, in certain cases, by deputy; and it is provided that officers acting temporarily in higher civil offices or commands are, in respect of visits, to be upon the same footing as if they were confirmed in such offices or commands. (*Orders in Council*, &c. prefixed to *Canada Statutes for 1879*, p. 42.)

^p Before the confederation of the British North American provinces, and subsequent to the introduction

Precedence.

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| <p>7. The president of the legislative council.</p> <p>8. The members of the legislative council.</p> <p>9. The speaker of the house of assembly.</p> <p>10. The puisne judges.</p> <p>11. The members of the house of assembly.</p> <p>12. The colonial secretary (not being in the executive council).</p> <p>13. The commissioners or government agents of provinces or districts.</p> <p>14. The attorney-general.</p> <p>15. The solicitor-general.</p> <p>16. The senior officer in command of the troops, if below the rank of colonel or lieutenant-colonel and the senior naval officer of corresponding rank.</p> <p>17. The archdeacon.</p> | <p>14. Similar to No. 5 in the general table.</p> <p>15. Members of the senate.</p> <p>16. Speaker of the house of commons.</p> <p>17. Puisne judges of the supreme court according to seniority.</p> <p>18. Judge of the exchequer court of Canada.^a</p> <p>19. Puisne judges of the courts of law and equity according to seniority.</p> <p>20. Members of the house of commons.</p> <p>21. Members of the executive council (provincial), within their province.</p> <p>22. Speaker of the legislative council, within his province.</p> <p>23. Members of the legislative council, within their province.</p> <p>24. Speaker of the legislative assembly, within his province.</p> <p>25. Members of the legislative assembly, within their province.</p> <p>26. Retired judges of whatever courts next after the present</p> |
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of responsible government therein, it was the rule that when an executive councillor retired from office, he was no longer entitled to be styled 'honourable.' An exception was made, however, in regard to persons who had served in the capacity of councillors 'for any considerable time, or with peculiar distinction.' Such individuals, upon the recommendation of the governor, and by command of the sovereign, conveyed ordinarily through a despatch from the secretary of state (and in exceptional cases by warrant under the royal sign-manual), were permitted to retain the title of 'honourable' upon retiring into private life; with precedence next after executive councillors for the time being, and, between themselves, according to their seniority upon retirement. (Nova Scotia Assem. Jour. 1859. App. Nos. 23 and 33, and see Queensland, Leg. Coun. Jour. 1879, Sess. 1, p. 41.) By a

circular despatch to the governors of the several colonies in Australia, dated in 1871 or 1872, and still (1892) holds good, the rule was laid down that such ex-ministers only as had held office for three years might be recommended to her Majesty by the governor for permission to retain the title of 'honourable' for life with the precedence above-mentioned. But this circular has never been applied to Canada, to Victoria, or to the Cape of Good Hope, in which colonies (from information received in 1892) the system of what is practically 'life membership,' on appointment to the privy council of the one, or to the executive council of the other, has been established. N. Zealand Parl. Pap. 1878, App. A. 1, pp. 15-18; message of Governor Robinson to the legislative council of the Cape of Good Hope, June 23, 1882.

^a By order in council, Feb. 17, 1890.

18. The treasurer, paymaster-general, or collector of internal revenue.	} Not being members of executive council.	judges of their respective courts. ^r	Precedence.
19. The auditor-general or inspector-general of accounts.			
20. The commissioner of Crown lands.			
21. The collector of customs.			
22. The comptroller of customs.			
23. The surveyor-general.			
24. Clerk of the executive council.			
25. Clerk of the legislative council.			
26. Clerk of the house of assembly. ^a			

In connection with the foregoing table of precedence for Canada, her Majesty was pleased to approve of the adoption of revised regulations in respect to the style and title to be used by the following personages:—

Titular distinctions in Canada.

The governor-general of Canada to be styled ‘his Excellency.’

The lieutenant-governors of the provinces to be styled ‘his Honour.’

The privy councillors of Canada to be styled ‘Honourable,’ and for life.

Senators of Canada, executive councillors of the provinces, the president of the legislative councils, and the speakers of the houses of assembly in the provinces,

^r Lord Carnarvon, then secretary of state, in a despatch of Aug. 29, 1877, to Australian governors, decided that retired judges of the supreme courts in Australia should retain the title of ‘honourable’ for life, within the colony, with precedence next after the existing judges of their respective courts. See *post*, p. 329. And by Sir M. Hicks-Beach’s despatch of Oct. 31, 1878, similar precedence is allowed to ex-judges of all other courts; viz. a retired chief-justice before actual puisne judges, and retired puisne judges next after those in service. Victoria Leg. Assem. Jour. 1877–78, App. B. No. 10; and Canada orders in council, &c., prefixed to Can.

Stats. for 1879, p. 41. Dom. Can. Gaz. Feb. 14, 1880.

^s Numbers 12 to 26 being office-holders and principal officials not of the executive council, governors of particular colonies, according to local requirement, have the liberty to fix their precedence, as their relative importance and duty are not necessarily the same in different colonies.

For rules of precedence, scale of general or social precedence in Great Britain, and relative precedence in the peerage, in different orders of knighthood, and in the army and navy, *vide* Burke’s Peerage, 1892, pp. 1643 to 1705. For Warrant of Precedence in India, *ib.* p. 1708.

to be severally styled 'Honourable,' but only during office, and the title not to be continued afterwards.

Gentlemen who were legislative councillors, at the time of the union, are permitted to retain their title of 'Honourable,' for life; but legislative councillors in the provinces are not in future to have that title.^t

Honours
conferred
upon
Canadian
statesmen
in 1867.

Shortly after the passing of the Imperial act of 1867, for the confederation into one dominion of Canada of the various colonies of British North America, her Majesty was graciously pleased to signify her intention of conferring special marks of royal grace and favour upon seven principal Canadian statesmen, who had been instrumental in the accomplishment of that great undertaking.

Accordingly, upon July 1, 1867, the appointed day for bringing into political existence the new dominion, the premier of Canada (Sir John A. Macdonald) was created a Knight Commander of the Bath. The position of Companion of the Bath was at the same time conferred upon certain ministers of state in the dominion. Two of the most eminent members of the administration, however (Messrs. G. E. Cartier and A. T. Galt), asked leave to decline the proffered distinction, on the ground that their prominent public services and recognised position in Canada would not warrant them in accepting a lower degree of distinction, in the distribution of honours upon this occasion, than that which had been assigned to Sir John A. Macdonald, lest their public usefulness should be thereby

^t For these despatches and the table of precedence for Canada, see the volume of Dominion Orders in Council, Proclamations, &c., pp. 427-429. It is understood that the omission of the 'speaker of the House of Commons' from the list of office-bearers in Canada who are entitled to be called 'honourable'

was purely accidental. By usage, the title is always conceded to him. The same remark will apply to judges of the superior courts of law and equity in Canada, as may be inferred from directions given in 1877, in regard to ex-judges in Australia. See *ante*, p. 319 *n*.

impaired. After some delay, owing to the technical difficulty that there was no precedent for refusing an honour which had actually been conferred upon an individual by the sovereign, a method was adopted which met the views of these gentlemen, without lessening their self-respect or exposing their motives to possible misconstruction.^u

Honours
conferred.

On March 23, 1868, the Canadian house of commons passed an address, asking for copies of the correspondence upon this subject. Upon receipt of the same, the papers were referred to a select committee. On May 15 this committee reported a recital of the facts above stated, and expressed satisfaction that her Majesty had since been pleased to raise Mr. G. E. Cartier to the dignity of a baronet of the United Kingdom. While this gracious act had removed any cause of misconstruction, so far as Mr. Cartier was concerned, the committee observed that it placed Mr. Galt in a still more objectionable position. They therefore recommended the presentation of an address to the Queen, praying her Majesty to cause such a remedy to be applied as might remove the grievance justly felt by Mr. Galt. Whereupon, an address to the Queen was immediately adopted by the house, and transmitted through the governor-general.^v No reply to this address was communicated to the house; but, in the ensuing year, the dignity of Knight of the Order of St. Michael and St. George was conferred upon Mr. Galt, in acknowledgment of his official services to the Crown.

Case of
Messrs.
Cartier
and Galt.

In 1859 the governor of South Australia (Sir R. G. MacDonnell) called the attention of the colonial secretary to certain deficiencies in the table of pre-

Prece-
dence in
South
Australia.

^u Canada Sess. Pap. 1867-68,
No. 64.

^v Canada Com. Jour. May 15,
1868.

Prece-
dence in
South
Australia.

cedence contained in the 'General Colonial Regulations,' above cited, especially in regard to the position of important colonial officers not named in that table. He observed that, in India, the governor-general in council has authority to settle disputed cases of precedence not coming within her Majesty's specific instructions and warrant; and he inquired whether a similar power could not be intrusted to the governor of a colony, as representing the Queen, so that he should himself decide in the first instance (and without *formally* consulting his executive council) all future disputed questions of personal precedence—reporting his decisions invariably to the secretary of state.

The go-
vernor to
decide
questions
of prece-
dence.

In reply to this request, the Duke of Newcastle forwarded an opinion from the law officers of the Crown, for the information and guidance of Governor MacDonnell, which distinctly assigned to the governor, as representing the Crown, the right and duty of determining all questions of personal precedence in a colony, in default of specific rules and instructions already prescribed by law or by the authority of the Crown, applicable to the case. 'In determining this precedence, it would be proper for the governor to have regard to the rules of precedence existing in the mother country, and to proceed by analogy to them; not being, however, in our opinion, bound to adhere strictly to those rules, in instances where the actual usages of the colonial society or the requirements of a particular case or class of cases seem to him to justify the establishing in the colony of a different rule. For it seems to us that a colony, though practically subordinate, must be regarded as, in social subjects, independent of the mother country; so that any rule of precedence recognised in the home society, but resting on usage only, is not necessarily in force in the colony, where the

whole structure of the social system may be different from what it is in the mother country.'

Prece-
dence in
South
Australia.

The opinion proceeds to suggest—in answer to inquiries sent to the colonial secretary by governors of other colonies—that the governor is free 'to determine, as it seems fit to himself, the precedence which he will allow between baronets on the one side and sons of peers on the other;' and likewise 'the precedence which he will allow to a knight on the one side and the chief-justice and the members of the court of policy on the other.' 'A consideration of the importance of conferring rank and dignity on persons holding office, judicial or political, would properly have much influence' in giving the latter personages precedence over a knight. And here it should be observed that the one hundred and fifty-eighth section of the 'Colonial Service Official Rules' provides that 'persons entitled to precedence in the United Kingdom or in foreign countries are not entitled, as of right, to the same precedence in the British colonies; but, in the absence of any special instructions from the Queen, the precedence of such persons relatively to the colonial officers, in the above-mentioned table of precedence, will be determined by the governor, having regard to the social condition of the colony under his government.'

Thus, on December 4, 1880, the Queen was graciously pleased to recognise the claim of Charles C. Grant, Esq., to the title of Baron de Longueil, of Longueil, of the province of Quebec, Canada, a title conferred upon his ancestor by Louis XIV. of France, in 1700, when Canada belonged to France. But no special precedence was granted to the baron.^w

In reference to the precedence due to wives of official persons, the opinion of the law officers of the Crown proceeds to state that the usage in England is, 'that

^w Can. Dom. Gazette, Jan. 22, 1881.

Precedence of wives of public officers.

the rank of the husband, if merely official, and not personal to himself, does not entitle the wife to a precedence higher than that which she would ordinarily have by virtue of her husband's personal rank.^x But we think that, in a colony, the determination of the precedence which the governor is to give to the wives rests with him to the same extent as the determination of the precedence to be given to the husbands does; and that, if it seems to him expedient to depart from the usage of the mother country, with respect either to all official persons or to the holders of particular offices, he is at liberty to do so.'

The secretary of state for the colonies did not deem it expedient to add any further directions to this opinion of the law officers of the Crown—beyond recommending the governor to adhere, as far as may be practicable, to the customs of the colony and to the table of colonial precedence.

Accordingly, the governor of South Australia (Sir James Fergusson), on May 9, 1871, fixed provisionally, and subject to the approval of the secretary of state, a table of precedence for use in that colony, which included all the principal public officers therein. The order of the civil service was recommended for the governor's sanction by his ministers.^y

This table of precedence for South Australia was transmitted to the house of assembly, in compliance with an address from that chamber, together with the aforementioned despatches and correspondence with the home government in relation to the question.

The first two offices in this table—having precedence assigned over all other colonial functionaries—were the bishop of Adelaide, and the Roman Catholic

^x See Sir B. Burke's *Reminiscences*, 1882, pp. 283, 287.

^y South Australia Parl. Proc. 1871, No. 115.

bishop. The right of the sovereign to confer precedence upon church dignitaries—irrespective of any connection between church and state—in any part of the Queen's dominions, has been already pointed out. It has been shown that this prerogative right has been recognised by a recent decision of the judicial committee of the privy council; and that in colonies where all churches and sects are upon a footing of equality in the sight of the law, precedence is given to 'archbishops and bishops,'—next after the governor-general, and the officers in supreme command of her Majesty's military and naval forces and the lieutenant-governors of the provinces in Canada.²

Ecclesiastical precedence in South Australia.

The South Australian legislature, however, were not satisfied with this arrangement. They disapproved of any precedence being allowed to ecclesiastical functionaries. They therefore passed a bill 'to provide for the regulation of precedency in South Australia,' which was designed to abolish utterly all precedence of ecclesiastics in the colony. Upon the advice of the colonial attorney-general, and in conformity with the royal instructions, the governor reserved this bill for the signification of her Majesty's pleasure.

The colonial secretary, in a despatch dated Feb. 10, 1872, notified the governor that her Majesty's ministers have been unable to advise that this bill should receive the royal assent; it being regarded as an encroachment upon the undoubted prerogative of the Queen, as the fountain of honour, to determine the precedence of her subjects. Any suggestion to amend the table of precedence in force in the colony, whether emanating from the governor, with the advice of his executive council, or from either or both of the houses of parliament in the colony, would always be most attentively

² See *ante*, p. 318 n.

Ecclesiastical precedence in South Australia.

considered, with a disposition to accede as far as possible to alterations proposed. But the Queen could not be advised to deprive individuals (such as the church dignitaries especially aimed at by this bill) of any precedence to which they were now entitled.^a

Whereupon, on June 19, 1872, the house of assembly of South Australia passed an address to the Queen, representing the grievance felt by the great majority of the inhabitants of the colony, at the precedence assigned to dignitaries of the Protestant Episcopal and Roman Catholic churches over ministers of other religious denominations therein, and praying her Majesty by the exercise of her prerogative to remove the same.^b In reply to this address, the colonial secretary, in a despatch dated Sept. 16, 1872, conveyed her Majesty's assurance that no bishop, or other minister, of whatever persuasion, to be hereafter appointed, should be allowed precedence in the colony. But the Queen could not consent to deprive any minister of precedence already conferred, so long as he retains his office; though he might voluntarily agree to relinquish such precedence.^c

Ecclesiastical titles in the colonies.

During the administration of William Pitt, and soon after the first appointment of colonial bishops in the West Indies, it was agreed to allow these dignitaries to be styled 'my lord.' Afterwards the practice became general; although, in the various letters-patent issued to bishops in North America and in Australia, up to the year 1866 (when the issue of episcopal letters patent in the colonies was abandoned), no uniform practice was observed; at one time, and in one instrument, the title of 'lord' would be appended to that of bishop, on another occasion it would be omitted; and

^a South Australia Parl. Pap. 1872, Nos. 61 and 68.

^c South Australian Jour. 1872, No. 238.

^b *Ib.* 1872, Jour. pp. 194, 230.

that indifferently, and upon no definite principle.^d Since then, bishops are not entitled to be officially addressed by government otherwise than as 'right reverend.'^e Stubbs tells us, however, that 'the title of "lord" does not, in England, imply a dignity created by the Crown, but is simply a descriptive or honorary appendage to some other dignity.' It 'belongs to all bishops in all churches,'—'nor has it anything to do with a royal prerogative of conferring titles, not being a recognised grade of peerage.'^f If this be correct, and few would be disposed to question the accuracy of so learned and painstaking a writer as Stubbs, it disposes of this vexed question in a very satisfactory manner.

Ecclesiastical titles in the colonies.

Upon the receipt by the governor of New Zealand, of a circular despatch, dated Aug. 29, 1877, from Lord Carnarvon, in reference to the dignity and precedence of judges in Australia,^g the premier of the colony (Sir George Grey) addressed a memorandum to the governor, in which, while admitting that the action taken by the secretary of state accorded with the wishes expressed by his predecessors in office—he took exception to the interference of the Crown, in a self-governing colony and without the consent of the general assembly, in establishing any order of rank and dignity therein.^h

Right of the sovereign to confer honours in a self-governing colony.

The governor transmitted this memorandum to the secretary of state in a despatch, dated May 22, 1878, wherein he declares his inability to understand the objection raised by the premier, or to see how the exercise by her Majesty—who is constitutionally the source of all honours throughout the empire—of her

^d Todd, *Parl. Govt.* v. 2, p. 524 *n.* new ed. p. 642 *n.*; *Com. Pap.* 1867, v. 48, pp. 855–914, particularly p. 908.

^e See *ante*, p. 318 *n.*

^f Stubbs, *Const. Hist. of England*, v. 3, p. 440.

^g See *ante*, p. 319 *n.*

^h In New South Wales, in 1882, a lengthy debate took place in the legislative assembly on a motion deprecating the practice of conferring titles on colonists by the Crown. The motion was negatived on the previous question. *The Colonies*, Dec. 29, 1882, p. 5.

Honours
in New
Zealand.

undoubted prerogative in conferring distinction upon a retired judge, can be supposed to interfere in the slightest degree with the constitution of New Zealand, or with the rights and privileges of the local parliament.ⁱ

On May 30, 1882, upon the receipt of intelligence that her Majesty the Queen had been pleased to confer the honour of knighthood upon two New Zealand statesmen, of opposite political opinions, the house of representatives passed a congratulatory resolution, by acclamation, in favour of one of these gentlemen (Sir John Hall), who, being present, returned thanks for the compliment thus unanimously paid to him.^j

The secretary of state, in his despatch of September 16, 1878, declares that no doubt is entertained by her Majesty's government as to the power of the Queen to confer the honour in question; and as the local ministers had approved of the act, it was needless to discuss it any further.^k

In a similar narrow and mistaken spirit, Sir George Grey afterwards remonstrated with Sir M. Hicks-Beach because honours for political services had been conferred, on the advice of her Majesty's colonial secretary, upon two leading members of the opposition in New Zealand. This proof of the impartiality of the Crown, and its paternal recognition of all public services, was thus turned into an argument against Imperial interference in colonial affairs, in a letter which is painful to read as the production of one who was formerly conspicuous for his eminent services as a colonial governor.^l The independent and necessarily impartial position of the Crown, in the distribution of honours in a colony, irrespective of political opinions, had previously been asserted in a despatch from secretary Sir J. S. Pakington, in 1852, to the governor of Nova Scotia, in relation to the appointment of Queen's counsel.^m

ⁱ N. Zealand Parl. Pap. 1878, A. 1, pp. 15-18.

^j N. Zealand Parl. Deb. v. 41, p. 130.

^k N. Zealand Parl. Pap. 1879, A. 9. For Sir M. Hicks-Beach's reply of Sept. 11, 1879, vindicating

the action of Imperial authorities, see *ib.* Sess. II. 1879, A. 2.

^l N. Zealand Parl. Deb. 1879, App. A. 9.

^m Nova Scotia Assem. Jour. 1853, App. 22, p. 284.

On April 27, 1818, an order of knighthood known as that of St. Michael and St. George was established by letters patent, for the purpose of affording an appropriate medium by which marks of royal favour might be conferred upon the natives of Malta and the Ionian Islands. The sovereignty of Malta was, and is, vested in the British Crown, while the Ionian Islands formed, at that period, an independent state, under the exclusive protection of the king of England. But, in 1864, England relinquished her control over these islands, and they were annexed to the kingdom of Greece. By additional letters patent under the great seal of Great Britain, issued on December 4, 1868, and May 30, 1877, the order of St. Michael and St. George was enlarged and extended for the express purpose of enabling the sovereign to confer distinction upon such of her subjects as 'may have rendered, or shall hereafter render, extraordinary and important services to her Majesty as sovereign of the United Kingdom of Great Britain and Ireland, within or in relation to any of her Majesty's colonial possessions; or who may become eminently distinguished therein by their talents, merits, virtues, loyalty, or services.' The Knights Grand Cross of this order are not to exceed sixty-five in number, of which twenty are for foreign services; the Knights Commanders are not to exceed two hundred, of which forty-five are for foreign services; and the Companions are not to exceed three hundred and forty-two, of which eighty are for foreign services. But Princes of the blood royal are constituted extra Knights Grand Cross, and foreign Princes, &c., honorary members of their respective classes.ⁿ

Order of
St. Mi-
chael
and St.
George.

ⁿ Col. Rules and Regulations, 1891, p. 313. For a list of honours and titular distinctions conferred on persons for services in and on behalf of the Australian colonies, from 1838 to 1879 inclusive, see Australian Dictionary of Dates, by J. Heaton, part 2, p. 120, and addenda, p. 1. The same for Canada, *vide* McCord's Handbook of Canadian Dates, p. 42.

Knights
of this
order
created in
Canada.

On May 24, 1879, the anniversary of the birthday of her most gracious Majesty, a special honour was conferred upon the dominion of Canada in the person of the governor-general, in that the nobleman holding that exalted office (the Marquis of Lorne) was authorised by her Majesty to hold an investiture of 'the most distinguished order of St. Michael and St. George,' at the city of Montreal, when, by command of the Queen, six Canadian gentlemen, all of them being members of the Queen's privy council for Canada, were created, by the governor-general in her Majesty's name, knights commanders of the order.^o This was a remarkable though not wholly unprecedented occurrence in a colony; inasmuch as honours and distinctions are usually conferred by the sovereign, personally, or by the lord-lieutenant of Ireland.'

On April 15, 1862, Sir Henry Barkly, governor of Victoria, acting under a special warrant from the Queen, publicly invested Major-General Sir T. S. Pratt, then commanding her Majesty's forces in Victoria, with the ribbon and badge of a knight commander of the Bath. This honour was conferred on General Pratt for his services in bringing the war in New Zealand to a successful termination. It was the first ceremony of the kind performed in Australia.^p

On June 11, 1870, at Montreal, H.R.H. Prince Arthur was invested, by royal warrant, with the insignia of a knight grand cross of St. Michael and St. George, by Sir John Young, governor-general of Canada.^q Again, on May 24, 1881, his excellency the Marquis of Lorne held an investiture of the same order at Quebec, when several Canadian gentlemen had honours conferred upon them.

A similar instance of express delegation from the sovereign to bestow, in her Majesty's name, honours and titular distinctions upon her subjects, in a distant part of the empire, is afforded upon the occasion of the visit of his Royal Highness the Prince of Wales to India. On Jan. 1, 1876, the Prince, in the presence of the

^o Canada Official Gazette, May Dates, pp. 167, 216.

26, 1879.

^q Montreal Gazette, June 13,

^p Heaton, Australian Dict. of 1870.

Viceroy of India, held a durbar at Calcutta, at which, acting under the authority of a royal warrant, dated Balmoral, Oct. 25, 1875, his Royal Highness held a chapter of the order of the Star of India, and invested certain persons, named in the warrant from the Queen, with the dignities of knight grand commander, knight commander, or companions of that order.^r

Since the confederation of the British North American provinces into the dominion of Canada, two questions have arisen, connected with the exercise of the prerogative of honour; firstly, as to whether appointments to the office of Queen's counsel should emanate from the governor-general or from the lieutenant-governor in the several provinces; and, secondly, as to the proper authority under which the great seals, in use in the provinces, should be appointed, and changed, from time to time, as necessity might require.

Canadian questions affecting the prerogative of honour.

On Jan. 4, 1872, the governor-general of Canada forwarded to the secretary of state for the colonies a report from the dominion minister of justice, requesting the opinion of the law officers of the Crown as to whether, since the passing of the British North America Act of 1867, it devolved upon the governor-general or upon the lieutenant-governors to appoint Queen's counsel; and whether a provincial legislature was competent to pass an act empowering the lieutenant-governor to make such appointments; and, finally, as to how the question of precedence or pre-audience should be settled.

Right to appoint Queen's counsel.

In his reply, dated Feb. 1, 1872, Lord Kimberley intimated that, in the opinion of the Crown law officers, the governor-general, as her Majesty's representative, was constitutionally competent to appoint Queen's counsel, but that the lieutenant-governor of a province had no such right. Nevertheless, they considered that any provincial legislature might authorise, by statute, the lieutenant-governor to make such appointments; and might determine the right of precedence or pre-audience, in the provincial courts, between Queen's counsel appointed by the governor-general or by the lieutenant-governor.

Notwithstanding this correspondence, or possibly in ignorance of it, the lieutenant-governor of Ontario, acting upon the advice of his ministers, and without previous legislation on the subject in Ontario,

^r For an account of the ceremonial, see Russell's *Tour of the Prince of Wales in India*, pp. 370-375.

Appoint-
ment of
Queen's
counsel in
Canada.

proceeded to appoint certain members of the provincial bar to be Queen's counsel. These appointments were announced in the Ontario official gazette of March 17, 1872. Shortly afterwards, upon a report from the dominion minister of justice, a minute of council was passed, and approved by the governor-general, setting forth reasons which led to the conclusion 'that, under the circumstances, great doubt must exist as to the validity of the commissions issued to' these gentlemen. To remove this doubt, and to prevent injurious consequences from an apparently illegal act, it was agreed that new commissions, appointing the same individuals to the office of Queen's counsel for Ontario, should be issued by the governor-general under the great seal of Canada.

Upon this decision being made known to the Ontario government, they protested, by a minute of council, approved by the lieutenant-governor, against the proposed action of the dominion government; claiming that such appointments appertained to the local and not to the federal jurisdiction. They also declared that a measure on this subject would shortly be submitted to the provincial legislature.

The governor-general in council replied, in a minute dated Dec. 13, 1872, which reiterated the opinions previously expressed, and advised that the governor-general should not relinquish the proposed exercise of the royal prerogative; but recommended an arrangement between the federal and provincial governments, by which Queen's counsel appointed by the governor-general should receive proper status and position in the provincial courts, and commissions issued under statutory authority by the lieutenant-governors should be recognised in dominion courts.⁸

Accordingly, on March 29, 1873, two acts passed by the Ontario legislature were assented to, in the Queen's name by the lieutenant-governor. One declared that it was lawful for the lieutenant-governor, under the great seal of the province, to appoint from among the members of the Ontario bar such persons as he may approve, to be, during pleasure, 'provincial officers under the name of her Majesty's counsel learned in the law for the province.' The other declared it to be 'lawful for the lieutenant-governor, by letters patent under the great seal of Ontario, to grant to any member of the bar a patent of precedence in the said courts.'⁹ Legislation to the same purport took place in the province of Quebec on Dec. 24, 1872,¹⁰ and in Nova Scotia in 1874.¹¹

⁸ Canada Sess. Pap. 1873, No. 50.

⁹ Ontario Statutes, 36 Vic. cc.

3 and 4.

¹⁰ Quebec Statutes, 36 Vic. c. 13.

¹¹ Nova Scotia Statutes, 37 Vic. cc. 20 and 21.

Meanwhile, in conformity with the minute of council above mentioned, the governor-general was pleased to appoint, on December 13, 1872, the gentlemen previously appointed by the Ontario government, to be Queen's counsel in and for the province of Ontario. And on December 18 other members of the Ontario bar received the same distinction from the governor-general. On April 2, 1873, various members of the bar in the provinces of Quebec, New Brunswick, and British Columbia, were appointed to a similar rank and position by his excellency the governor-general.

Appoint-
ment of
Queen's
counsel in
Canada.

Acting under the authority of statutes passed by the local legislatures as aforesaid, the lieutenant-governors in the several provinces directed the issue of letters patent, under the provincial great seals, conferring the distinction and precedence of Queen's counsel within the province upon certain members of the provincial bar. In some instances, the same individuals received patents from the governor-general and from a lieutenant-governor.

In due course this vexed question was submitted to the consideration of the courts of law. The issue was first raised in Nova Scotia. By a Nova Scotia act of 1874 (c. 20), the lieutenant-governor was empowered to appoint members of the provincial bar to be Queen's counsel in and for the province by letters patent under the great seal. And by c. 21 of the same session the lieutenant-governor was authorised to assign patents of precedence to the several Queen's counsel in Nova Scotia who had been appointed since confederation. Under this act, on May 26, 1876, letters patent were issued, sealed by the great seal of the province, appointing additional Queen's counsel, and establishing a new order of precedence, which gave precedence and pre-audience to certain persons above Mr. J. N. Ritchie, Q.C., who were not previously entitled thereto.

Mr. Ritchie had been appointed to the rank of Queen's counsel in 1872, by a patent from the governor-general. He therefore appealed to the supreme court of the province for a recognition of his rank and precedence before the gentlemen who had, as he contended, unlawfully obtained precedence over him by virtue of the letters patent aforesaid. Mr. Ritchie protested against the patent of precedence granted to these gentlemen, on the grounds, firstly, that the Nova Scotia acts of 1874, cc. 20 and 21, were *ultra vires*, and the appointments thereunder invalid; and, secondly, that the act to enable the governor in council to regulate the precedence of Queen's counsel could not lawfully be construed retrospectively, so as to interfere with his precedence by virtue of his appointment in 1872.

The matter of precedence was investigated by the supreme court of Nova Scotia. Judgment was rendered in December 1876. The

Appoint-
ment of
Queen's
counsel in
Canada.

court refused to declare that the provincial statutes of 1874 were *ultra vires*, inasmuch as her Majesty, through her secretary of state, had suggested the passing of such acts, and afterwards, through the lieutenant-governor, had given her assent to the same; thereby authorising, at any rate 'prospectively, after the passing of the act, her lieutenant-governor of this province to exercise her prerogative right, to the extent in which it is necessarily conferred on that high officer by the statute.' But as the precedence claimed by the gentlemen who had received provincial appointments over Mr. Ritchie had been declared to be retrospective, contrary to the provisions of the statute, the court decided that their claim was unauthorised and invalid. The majority of the court were also of opinion that the wrong seal had been made use of, for the purpose of authenticating the patents issued by the lieutenant-governor.* But this is a distinct question, which will be presently considered.

In 1878 the whole matter was brought before the supreme court of the dominion upon an appeal.

On November 4, 1879, this court gave judgment. They dismissed the appeal with costs, thereby confirming to Mr. Ritchie, Q.C., his precedence, by virtue of his appointment in 1872, under the great seal of the dominion.

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Queen's
counsel.

Furthermore, a majority of the court expressed a decided opinion that the sole right of conferring the rank and dignity of Queen's counsel within the dominion of Canada appertained to the Queen, or to her direct representative, the governor-general. That the British North America Act, 1867, does not, either expressly or by inference, divest her Majesty of this branch of her prerogative, or enable the lieutenant-governors of the provinces, either with or without an authority derived from the provincial legislatures, to exercise the same. That authority to exercise this prerogative could not be conveyed by a mere despatch from a secretary of state, but only by warrant, under the sovereign's sign manual. Moreover the acts of the Nova Scotia legislature (and, by the same rule, the acts of the other provincial legislatures), in so far as they assume to invest the lieutenant-

* Russell and Chesley, *Nova Scotia Rep.* v. 2, p. 450; Lordly v. Kiely, *ib.* v. 3, p. 506. See also Canada Sess. Pap. 1877, No. 86.

governor with power to appoint to the rank or dignity of Queen's counsel, are *ultra vires* and void; inasmuch as the local legislatures have a prescribed and limited jurisdiction, and if they assume to pass laws beyond the limit of their defined and constitutional powers, neither the acquiescence of the dominion parliament in such legislation, nor the mere sanction of the Queen to such laws could validate them. For the Queen is not an integral part of the legislatures of the provinces, in the same sense as she is declared to be of the dominion parliament, by the British North America Act, and therefore no provincial statute can impair or affect her Majesty's right to the exclusive exercise of all her prerogative powers.^y

Appoint-
ment of
Queen's
counsel in
Canada.

The effect of this decision was to annul the appointment of about one hundred Queen's counsel unlawfully appointed by the lieutenant-governors in the various provinces of the dominion. The decision was received with much satisfaction by the leading lawyers and judges throughout Canada.^z On October 11, 1880, fifty-three gentlemen, practising at the bar in the provinces of Ontario, Quebec, Nova Scotia, New Brunswick, and Prince Edward Island, were appointed Queen's counsel by the governor-general. The list included a large proportion of persons who had been illegally appointed to this rank by lieutenant-governors of their respective provinces.^a

This admirable judgment entirely accords with the constitutional doctrine propounded at the beginning of this section, which reserves to the sovereign, or to her direct and immediate representative, the administration of the prerogative of honour.

Upon the other question before referred to (see *ante*, p. 333) it should be observed that it is a prerogative of

^y *Lenoir v. Ritchie*, Can. Sup. Ct. Rep. v. 3, p. 576; and see *ib. v. 4*, pp. 237, 317, 348. But see *post*, pp. 573-4, for decision of privy council in *Maritime Bank case*, declaring powers of Crown in local legislatures. See also *Executive Power case, post*, p. 367.

^z *Montreal Legal News*, v. 2, pp. 369, 392, 408.

^a *Can. Law Jour. N. S. v. 16*, p. 286.

Great seal. the Crown, to be exercised by warrant from the Queen in Council, to appoint and direct the use of a public seal for any colony ; and likewise to authorise and provide for any new public seal that may be required from time to time. It being understood, however, that the cost of supplying a new seal should be borne by the colony.^b

Of Nova
Scotia.

As has been already intimated, in the case of Lenoir *v.* Ritchie, the question of the validity of a change in the existing great seal of the province of Nova Scotia was raised ; and the use of the old seal, for the purpose of authenticating the appointment of Queen's counsel, instead of the new seal, assigned to Nova Scotia as a province of the dominion, was declared by a majority of the supreme court of Nova Scotia to have been illegal.

The uncertainty of the law, and the importance of obtaining a clear and speedy decision upon this question of the seals, had previously induced the government of Nova Scotia to request the intervention of the Imperial authorities, and the passing of an Imperial statute, to remove all doubts upon the subject. This request was made known to the governor-general by a despatch from Lieutenant-Governor Archibald, dated March 28, 1877.

Meanwhile, the Imperial government itself had decided, upon the advice of the law officers of the Crown that, inasmuch as the new seal had not been formally and officially introduced into Nova Scotia, the use of the old seal of the province was not irregular ; and that any legislation required to authorise a change of seal, or to validate supposed irregularities, should emanate from the dominion parliament. So, in 1877,

^b N. Zealand House Jour. 1881, App. A. 1, p. 2 ; A. 2, pp. 15, 25 ; *ib.* 1882, App. A. p. 2.

a dominion act was passed authorising the lieutenant-governor in council, in each and all of the provinces, to change the great seal of the province and to validate the past use of the old seal in Nova Scotia.^c Statutes to this effect were thereupon passed by the Nova Scotia legislature without delay.^d Great seal.

The interest which attaches to this question from a constitutional point of view, and its bearing upon the royal prerogative, which we are now considering, will justify a fuller mention of the circumstances which led to this settlement of the difficulty.

On October 14, 1868, the colonial secretary (the Duke of Buckingham) forwarded to the governor-general of Canada (Lord Monck) her Majesty's warrant granting and assigning certain armorial bearings to be hereafter used on seals, shields, banners, flags, and otherwise in and by the several provinces forming part of the dominion of Canada, 'for the greater honour and distinction of the said provinces;' and declaring that the said united provinces shall use 'a great seal of Canada' which shall be composed of a combination of the arms of the particular provinces. Seals for Canada.

On May 8, 1869, the colonial secretary transmitted to the governor-general five seals, to be used by the dominion of Canada and by the four provinces composing the same. Also, the Queen's warrant, under her royal sign-manual, directing the use of the said seals, and requiring that the old seals, heretofore in use, should be returned, in order that they might be defaced by her Majesty in council.

On July 2, 1869, the governor-general applied to the secretary of state for instructions for his guidance in respect to the four provincial seals. He enclosed a memorandum from the minister of justice, which raised the question whether it was not within the competency of the lieutenant-governors in council (under the one hundred and thirty-sixth section of the British North America Act) to appoint and direct the great seals to be used in the several provinces of the dominion; the more so as these lieutenant-governors were now appointed by the governor-general in council and not by the Queen.

In his reply, dated August 23, 1869, the colonial secretary ex-

^c Canada Act, 40 Vic. c. 3.

^d N. S. Acts, 40 Vic. cc. 1 and 2.

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case.

pressed his conviction that the right of her Majesty exclusively to order and to change at will the great seals of the provinces was as unquestionable as her right to determine the great seal of the dominion, which had not been disputed ; and that, as this right was in existence before the passing of the British North America Act, it cannot be deemed to have been taken away by implication, to be inferred from the one hundred and thirty-sixth section aforesaid, which is in terms expressly confined to the provinces of Ontario and Quebec. This section, moreover, may be construed as prescribing the proper mode of introducing any alteration of the seals in use in those provinces ; namely, by proclamation, or by order of 'the lieutenant-governor in council,' and not as limiting the Queen's prerogative to appoint and direct the seals to be used. [The clause is as follows : 'Until altered by the lieutenant-governor in council, the great seals of Ontario and Quebec respectively shall be the same, or of the same design, as those used in the provinces of Upper Canada and Lower Canada respectively, before their union in 1841, as the province of Canada.'] If, on the contrary, this clause is assumed to give direct and sole power to the lieutenant-governors of Ontario and Quebec in council to alter the seals of those provinces at pleasure, the same right should be conceded to the lieutenant-governors of New Brunswick and Nova Scotia ; and this authority should be conferred either by an Imperial statute or by local legislation, to which the consent of the Crown should first be given.

Accordingly, on November 16, 1869, the dominion government directed that the great seals for Nova Scotia and New Brunswick should be transmitted to the lieutenant-governors of those provinces, with instructions to give effect to the royal pleasure by the adoption of the same for use in their governments. The new seals for Ontario and Quebec were authorised to be forwarded in like manner, with copies of the correspondence on the subject, so as to afford these governments 'the opportunity of adopting such seals, should they think proper to do so.'

The executive council of Nova Scotia, however, preferred their old seal to a new one. They therefore adopted a minute, which was forwarded to the governor-general for the purpose of transmission to her Majesty's government, wherein, while freely admitting the right of the Queen to change and alter the provincial seal at pleasure, they asked leave to retain in use their old seal, instead of adopting a new one. They afterwards craved permission from the Crown to pass an act to sanction the continued use of the old seal, but authorising the lieutenant-governor to alter and appoint the use of a new great seal in future. The secretary of state for the

dominion acknowledged the receipt of this minute, but made no reply to its request.

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great seal
case.

For several years afterwards, the question of the seals remained in abeyance in Nova Scotia. At length, on March 28, 1877, the lieutenant-governor wrote to the dominion secretary of state, to call attention to a new difficulty which had arisen out of this matter. By two acts, passed in 1874, the lieutenant-governor in council was empowered to appoint Queen's counsel, and to regulate precedence at the provincial bar. He had, accordingly, issued certain patents of precedence under the great seal of the province. The supreme court at Halifax, however, in a judgment already referred to,^e impugned the validity of this proceeding, partly on the ground that the seal used to authenticate these patents was the old province seal, and not the new seal directed to be made use of by the Queen's warrant of May 7, 1869. The court were of opinion that the use of the old seal was no longer legal, and that 'the new seal, after its delivery to the lieutenant-governor in 1869, became, and is now, the great seal of Nova Scotia, and the only one.'

With a view to dispose of this difficult question, the provincial government requested the dominion government to forward an address to the Queen, from the council and assembly of Nova Scotia, to solicit the passing of an Imperial statute for its solution. But, before this request could be complied with, a despatch was received by the governor-general from the colonial secretary, dated March 29, 1877, which stated that the law officers of the Crown were of opinion that the Queen's warrant, of May 7, 1869, above mentioned, was directory and not imperative, so that the non-observance of its injunctions did not impair the validity of documents which had been authenticated by means of the old seal, the use of which was not abolished, until the new seal was formally introduced; that while the failure to comply with the directions of the royal warrant in regard to the introduction of the new seal might properly be condoned by Imperial authority, yet, under the existing circumstances, and having regard to the provisions of the British North America Act, it would be more advisable to have recourse to dominion legislation for this purpose.

These opinions were approved by the governor-general in council; and the lieutenant-governor of Nova Scotia was notified thereof.^f

Immediately afterwards, as has been already explained, the dominion parliament passed an act to remove doubts on this subject, 'so far as the parliament of Canada may have power to act in

^e See *ante*, p. 336.

^f Canada Sess. Pap. 1877, No. 86.

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case.

the premises,' and to declare that 'the lieutenant-governor of each province in council has the power of appointing and of altering from time to time the great seal of the province. This act also declared that the use, heretofore, of the old seal, in Nova Scotia, should be deemed to have been valid, 'notwithstanding any doubt which may exist as to such seal being the great seal.'^s

On their part, the local legislature of Nova Scotia lost no time in acting upon these conclusions. In the same year, and without waiting (as they should have done, according to the opinion of the English Crown law officers) for dominion legislation on the subject, they passed two statutes—one 'to empower the lieutenant-governor of the province in council to alter and change the great seal of the province from time to time;' and the other, 'to ratify and confirm all acts and proceedings heretofore had and done under the great seal' previously in use in this province, from the commencement of the year 1869 until the said great seal shall have been changed by order of the governor in council.^h

Overlooking the irregularity attending the passing of these acts, before due authority for such enactments had been given by the dominion parliament, they were permitted to remain in operation, and thus to dispose effectually of a question which had continued in dispute for nearly ten years.ⁱ

Inasmuch as a majority of the judges of the supreme court of Nova Scotia, in giving judgment in the case of *Lenoir v. Ritchie*, had, as we have seen, dwelt at considerable length upon the question of the validity of the seal used to authenticate the patents issued by the lieutenant-governor to confer the rank of Queen's counsel upon certain lawyers in the province, and as it had been held, by a majority of the judges of that court, that the seal affixed to these patents was not the true great seal of Nova Scotia, this question necessarily came under the notice of the supreme court of the dominion, in deliberating upon the appeal from the judgment of the Nova Scotia court, in this case. The judges of the supreme court of Canada did not, however, deem it of consequence to consider this question. They were evidently of opinion that it had been duly settled by competent authority, and that no judicial interposition was required, either to explain the law or to regulate its operation.

Akin to the matter of seals and armorial bearings of colonies is the question of appropriate badges for flags, to be used, officially, by

^s Canada Act, 40 Vic. c. 8.

^h Nova Scotia Statutes, 40 Vic. cc. 1 and 2.

ⁱ See Doutre, *Const. of Canada*,

p. 375. On Nov. 30, 1869, the lieutenant-governor of Quebec passed an order in council adopting a new provincial seal. Prefixed to Quebec Stat. 1882.

the governor, and by government vessels in the particular colony. This is arranged after consultation with the colonial authorities by the secretary of state.^j Flags.

Permission to use the prefix 'royal' in the name and title of any institution in a colony, or elsewhere, can only be granted by the sovereign.^k Title of
'Royal'
to an
institute.

^j Lord Carnarvon's despatch, House Jour. 1870, App. 1, p. 88.
Aug. 23, 1875, in Queensland Leg.

^k Royal Canadian Academy of
Coun. Jour. 1876, p. 305; N. Zeal. Arts, Can. Dom. Gaz. July 17, 1880.

CHAPTER XI.

IMPERIAL DOMINION EXERCISABLE OVER SELF-GOVERNING COLONIES: BY THE ADMINISTRATION OF THE PREROGATIVE OF MERCY.

Prerogative of mercy.

IN the official rules and regulations for her Majesty's colonial service, it is stated that the powers of every officer administering a colonial government are conferred, and his duties for the most part defined, in her Majesty's commission and the instructions with which he is furnished. But that, subject to the special law of each colony, it is customary that a governor should be 'empowered to grant a pardon or respite to any criminal convicted in the colonial courts of justice.' And 'he may pardon persons imprisoned in colonial gaols under sentence of a court-martial; but this is not to be done without consulting the officer in command of the forces.' Furthermore, 'he has in general the power of remitting any fines, penalties, or forfeitures, which may accrue to the Queen; but if the fine exceeds fifty pounds, he is, in some colonies, only at liberty to suspend the payment of it until her Majesty's pleasure can be known.'^a

It is also provided that 'no judge presiding on a criminal trial must, upon any account, fail to take notes of the evidence adduced, and no capital sentence must

^a Col. Reg. 1891, secs. 22-25. see Lyon's Law of India, v. 1, Crim. Forsyth, Const. Law, pp. 75-82, Proc. Code, p. 71; The Queen v. 460. For the special law in India, Burah, 3 L. R. App. p. 899.

be executed until the governor of the colony shall have perused those notes.' Prerogative of mercy.

'In general no reference in criminal cases is to be made from the government of any colony to this country, with a view to the confirmation or remission of sentences pronounced by the colonial courts. But her Majesty's government will be ready to afford any information, instructions, or advice, for which the governor may think it necessary to apply, whenever any question may arise on any criminal proceeding on which there may be any special and adequate motive for invoking the interference of her Majesty's government in this country. Whenever a capital sentence shall have been executed, a report of it must be transmitted to the secretary of state.'^b

By these regulations, direct and exclusive authority is conferred upon governors of British colonies holding commissions from the Crown to administer the royal prerogative of pardon to any criminal convicted in any court of justice in the colony.^c Exercise of this prerogative by colonial governors.

More explicit and detailed directions on this subject are embodied in the royal commission of every colonial governor, and in the instructions accompanying the same. These directions have been modified of late years, particularly in the case of colonies in the enjoyment of 'responsible government,' and to a still greater extent in reference to the dominion of Canada.

The revised instructions applicable to self-governing colonies in general are to be found in the letters patent and royal instructions issued to the governor of South Australia, on April 28, 1877.

By these official instruments the governor is authorised and empowered by her Majesty, 'as he shall see

^b Col. Reg. 1892, secs. 406, 407. ported convicts, see Imp. act, 6 & 7
Circular Despatch of Nov. 14, 1877. Vic. c. 7, sec. 2; Barnett v. Blake,

^c As to mode of pardoning trans- 2 Drew & Sm. p. 117.

Instructions for the guidance of governors in granting pardon.

Lawful conditions.

occasion, in our name and on our behalf, when any crime has been committed within our said colony, or for which the offender may be tried therein, to grant a pardon to any accomplice in such crime who shall give such information as shall lead to the conviction of the principal offender, or one of such offenders if more than one; and, further, to grant to any offender convicted in any court, or before any judge, or other magistrate, within our said colony, a pardon either free or subject to *lawful conditions*; or any respite of the execution of the sentence passed on such offender, for such period as to our said governor may seem fit; and to remit any fines or forfeitures due or accrued to us in respect thereof; provided always, that our said governor shall in no case, except where the offence has been of a political nature unaccompanied by any other grave crime, make it a condition of any pardon or remission of sentence that the offender shall absent himself, or be removed from our said colony.'

It was decided by the supreme court of Mauritius in February, 1881, in the case of one Seebaruth, under sentence of death for murder, but who had been pardoned by the governor, subject to the condition of his imprisonment at hard labour for life, that the words *lawful conditions*, in the royal instructions, mean any conditions which are not *contra bonos mores*, or *malum in se*, and are not limited to such conditions only as the judicial authority of the colony were competent to impose, by way of punishment—for this was not a mode of punishment recognised by the penal code of the colony—although the person sentenced was willing to consent to the condition prescribed in order to save his life.^d

The twelfth section of the draft of instructions accompanying the letters patent aforesaid, further provides that the governor shall call upon the judge presiding at the trial of any offender who may be condemned to suffer death by the sentence of any court

^d MSS. judgment communicated by Chief-justice A. G. Ellis.

Prerogative of mercy.

within the said colony, to make to him a written report of the case of such offender, and such report shall be taken into consideration by the governor at the next meeting of the executive council, where the judge may be specially summoned to attend with his notes; 'and our said governor shall not pardon or reprieve any such offender as aforesaid, unless it shall appear to him expedient so to do, upon receiving the advice of our said executive council therein; but in all such cases he is to decide either to extend or to withhold a pardon or reprieve, according to *his own deliberate judgment*, whether the members of our said executive council concur therein or otherwise; entering, nevertheless, on the minutes of our said executive council a minute of his reasons at length, in case he should decide any such question in opposition to the judgment of the majority of the members thereof.'

Acting under these revised instructions, Governor Gordon, of New Zealand, reported to the secretary of state, on August 22, 1881, his reasons for commuting the sentence of death passed upon a Maori, for murder, agreeably to the advice of the premier, but upon 'his own deliberate judgment,' and contrary to the opinion of other members of the executive council.^f

14.3 In administering the prerogative of mercy, a governor in council does not act as a court of appeal in criminal cases. For though in exercising the royal prerogative the governor may remit a sentence, he does not technically reverse it, nor by his action in any way pronounce it wrong. This he could only do after hearing an appeal from the finding of the court, if there were provision for such an appeal. The act of pardoning a sentenced criminal is one of pure clemency: it is in no

An act of clemency, not of judicial authority.

^e South Australia Parl. Proc. 1877, v. 3, No. 109.

^f N. Zealand House Jour. 1881, App. A. 1 a.

Prerogative of mercy.

respect judicial. And not only in capital cases, where the course of procedure to be taken by the governor is prescribed by the royal instructions, but in all cases where clemency is sought at his hands, a governor would do well to consult informally those who could best assist his judgment; more especially the Crown prosecutor and the judge who has tried the case, whose advice would doubtless be readily afforded when thus solicited. But judges should not be required to report beforehand upon every case wherein they have passed sentence, as that would place both the judges and the governor in an untenable and undesirable position. ^g

The independent authority which is conferred upon governors by their commission and instructions to determine absolutely, whether to grant or to withhold the royal clemency to criminal offenders, irrespective of the opinions expressed or advice given by their responsible ministers, has given rise in repeated instances to complaints, as being a proceeding at variance with the principle of local self-government, and with the responsibility of ministers, whose advice the governor is required to ask, but is not obliged to follow.

Exercise of this prerogative in self-governing colonies.

With a view to allay dissatisfaction, and to define with greater precision the constitutional practice which should be observed in cases of this kind, her Majesty's secretary of state for the colonies (Lord Carnarvon) addressed a circular despatch to the governors of all the Australian colonies on this subject, on May 4, 1875.

This despatch proceeds to state 'that it should be understood that no capital sentence may be either carried out, commuted, or remitted, without the consideration of the case by the governor and his ministers, assembled in executive council. A minor sentence

^g Secretary of state (Lord Carnarvon) to Governor Weld, of Tasmania. Tasm. Leg. Coun. Jour. 1878, App. No. 36, p. 8.

may be commuted or remitted by the governor after he has duly considered the advice either of his ministers collectively, or of the minister more immediately responsible for matters connected with the administration of justice.' All such advice, however, whether tendered in council or otherwise, should be in writing. Upon receiving the same, the governor 'has to decide for himself how he will act,' 'Under a system of responsible government, he will allow greater weight to the opinion of his ministers in cases affecting the internal administration of the colony, than in cases in which matters of Imperial interest or policy, or the interests of other countries or colonies are involved.' Nevertheless, under all circumstances, 'it is true that a governor may (and indeed must, if in his judgment it seems right) decide in opposition to the advice tendered to him. But the ministers will have absolved themselves of their responsibility, and though in an extreme case—which, for the sake of argument, may be stated, although it is not likely to arise in practice—[the local] parliament, if it disapproves the action taken, may require the ministers to resign; either on the ground that they tendered wrong advice, or that they failed to enforce recommendations deemed to be right. I do not think the great principle of parliamentary responsibility is impaired by this result. On the other hand, a governor who, by acting in opposition to the advice of his ministers, has brought about their resignation, will obviously have assumed a responsibility for which he will have to account to her Majesty's government.'

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The colonial secretary proceeds to state that he knows it has been argued 'that ministers cannot undertake to be responsible for the administration of affairs unless their advice is necessarily to prevail on all questions, including those connected with the prerogative of pardon. But I am led to believe that this view does

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not meet with general acceptance, and there is at all events good reason why it should not. The pressure, political as well as social, which would be brought to bear upon the ministers if the decision of such questions rested practically with them, would be most embarrassing to them, while the ultimate consequences might be a serious interference with the sentences of the courts.

‘On the whole, therefore, I hope that the colonial legislatures, and public opinion generally, will concur with me in the opinion that the existing rule and practice is salutary, and may with advantage be maintained.’^h

Double responsibility for exercise of this prerogative.

Expressing himself to a similar effect, in a debate in the house of lords upon this question, on April 16, 1875, Earl Carnarvon adds these significant remarks: ‘No doubt it may be objected to the system of the governor consulting his ministry, and still acting on his own judgment, that it sets up a double responsibility. In reply, I submit that in this case a concurrent responsibility is better. On the one hand, the governor will not be relieved of his responsibility to the Crown, and, on the other hand, the local government will not be relieved of its responsibility to its own parliament; so that, while the colonial parliament may punish the minister for improper advice, the Crown may punish the governor for an improper decision. The fact is that, in these matters, we cannot be too logical,’ an expression which was afterwards explained to mean ‘we ought not to be too logical.’ⁱ

These conclusions, however, merely point to the possible consequences of a material difference of

^h Com. Pap. 1875, v. 53, p. 696. See also, to the same effect, Earl Carnarvon’s despatches to Governor Robinson, of Oct. 7, 1874; *ib.* p. 678.

ⁱ Hans. D. v. 223, p. 1073. See the Earl of Kimberley’s speech, *ib.* p. 1076.

opinion, upon a question arising out of the exercise by a governor of the prerogative of mercy, between the Crown and the governor on the one hand, and between his ministers and the local parliament on the other. It is quite conceivable that a governor might so act, in a case of this description, as to merit and receive a rebuke from the Crown, without, at the same time, being recalled or dismissed from office. In like manner, it is equally reasonable to suppose that, under certain circumstances, one or both of the houses of the local parliament might record their disapproval of advice given by ministers, in a matter affecting the administration of the prerogative of mercy by the governor, without their insisting that their vote of censure should be followed up by the resignation of the ministry. While it is true that, as a general principle, 'advice and responsibility go hand in hand,' complete responsibility for an act should not always be insisted upon, when that act is performed by one who is himself primarily responsible for it, on Imperial considerations, which remove the act itself from the category of cases of purely local import and signification.

Prerogative of mercy.

The undermentioned precedents will exhibit these principles in action, and will show their practical operation in colonial politics :—

After the establishment of responsible government in the several colonies of Australia, much misapprehension and diversity of practice arose therein, in regard to the constitutional mode of dealing with applications for the remission or mitigation of sentences upon convicted criminals.

Australian precedents.

In some places it was customary to allow the prerogative of mercy to be administered, as in ordinary matters of local concern, upon the advice of ministers, without attaching to the governor any peculiar or exclusive responsibility. So far had this departure from

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strict rule, and from the obligations imposed upon the governor by his instructions, been carried that, in at least one colony, it had been the practice for the governor to leave signed pardons in blank, to be filled up and used during his temporary absence from the seat of government.¹

Lord Belmore in New South Wales.

Shortly after the appointment of the Earl of Belmore, in 1868, to be governor of New South Wales, the proper constitutional procedure, in the administration of this prerogative, was amicably discussed between himself and the premier (Mr. afterwards Sir John Robertson). By mutual consent, the secretary of state for the colonies was appealed to for his views in the matter of the personal responsibility of the governor in granting or withholding remissions of sentences, as to whether, in fact, the governor was bound by his instructions to act on his own independent judgment or not.

This application elicited from the secretary of state (Lord Granville) a brief reply, dated Oct. 4, 1869, which said that 'the responsibility of deciding upon such applications rests with the governor, and he has undoubtedly a right to act upon his own independent judgment. But unless any Imperial interest or policy is involved, as might be the case in a matter of treason or slave-trading, or in matters in which foreigners might be concerned, the governor would be bound to allow great weight to the recommendation of his ministry.'^k

Lord Granville's despatch was followed by another from his successor, Lord Kimberley, addressed to all the Australian governors, and dated Nov. 1, 1871. It was herein stated that 'the governor, as invested with a portion of the Queen's prerogative, is bound to examine personally each case in which he is called upon to exercise the power entrusted to him, although in a colony under responsible government he will, of course, pay due regard to the advice of his ministers, who are responsible to the colony for the proper administration of justice and the prevention of crime, and will not grant any pardon without receiving their advice thereupon.'¹

Clear and explicit as were the directions contained in this circular despatch (of which a brief extract only is given in the preceding citation), they appear to have been misunderstood in New South Wales. Upon the arrival of Sir Hercules Robinson in that colony

¹ N. Zealand House of Rep. p. 336.

Jour. 1871, App. v. 1, pp. 79-82, ^k Com. Pap. 1875, v. 58, pp. 631, 90; *ib.* 1872, A. No. 1, a. p. 10. 632.

N. Zealand Parl. D. July 5, 1876, ¹ *ib.* p. 633.

in June, 1872, to assume the government, he found a practice prevailing there almost as objectionable and irregular as the one above mentioned which was complained of by Lord Belmore ; namely, that all applications for mitigation or pardon of sentences (not being capital cases) were expected to be disposed of by the governor himself, unaided by advice from any minister. Governor Robinson lost no time in applying to the colonial secretary for further instructions thereupon.

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Sir Hercules Robinson.

Lord Kimberley, in reply to this appeal, wrote a despatch, dated Feb. 17, 1873, pointing out that there was no inconsistency in previous instructions issued from the colonial office on this subject. 'A governor, in granting pardons, is exercising a portion of the Queen's prerogative, and has strictly a right to exercise an independent judgment ;' but, in a colony under responsible government, he is 'bound not to grant any pardon without receiving [ministerial] advice thereon.' It is only necessary, 'in capital cases,' for the governor to 'formally consult with his ministers in council.' In other cases, the governor may consult, or act upon the advice of, 'the minister who is, for the time being, primarily concerned in such matters, in whatever manner is most convenient to both.'^m

Impressed with the importance of securing ministerial responsibility on behalf of all administrative acts he might perform, and considering these directions as a ratification by the colonial minister of this doctrine, Governor Robinson lost no time in informing his chief minister (Mr. afterwards Sir H. Parkes) of his readiness to initiate a system in regard to the prerogative of pardon in strict accordance with constitutional principles.

Mr. Parkes embodied his own views upon the subject in a memorandum, dated May 30, 1874. 'He preferred that the responsibility of deciding upon applications for mitigation of sentences should remain, as heretofore, solely with the governor ; but, if a change were insisted on, and the cases of prisoners were to be decided on the advice of ministers, as required by the secretary of state, he could see no sufficient reason for making a distinction between this class of business and the ordinary business of government. In effect, he declined to accept any responsibility for ministers, unless they had, not only in form, but in substance, a voice in such decisions.'ⁿ

Contrasting the 'independent judgment' claimed for the governor, under his instructions, with the position of the sovereign in the mother country, Mr. Parkes proceeds to remark : 'There can be no question, I believe, that from the beginning of the present reign

^m Com. Pap. 1875, v. 53, pp. 637, 642.

ⁿ *Ib.* pp. 638, 642.

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the home secretary in England decides absolutely in all matters of this kind in the name of the Crown, and that the Crown does not in practice interfere.'^o This portion of the prerogative, then, when intrusted to the governor of a colony, 'unlike the prerogative in England, is intended to be a reality in its exercise;' and the governor, in such cases, 'is subject to a superior and instructing authority.' And, even when ministers are permitted to 'advise him,' it cannot be doubted that the advice here intended is wholly distinct in its nature from the advice given in the general conduct of affairs. In the general case, the advice is uniformly accepted, as the first condition of the adviser continuing in office.' . . . 'The exceptional advice implied seems to be of the nature of opinion or suggestions, to which weight may be attached as coming from persons "responsible to the colony for the proper administration of justice and the prevention of crime," but which, in any case or in every case, may be partially or wholly disregarded.'^p

In reply to this memorandum, Governor Robinson observes that 'under a constitutional form of government, the Crown is supposed to accept or reject the advice of responsible ministers.' As governor, he has an 'undoubted right' to reject such advice—if he is prepared to accept the consequences. But, practically, he would never do so, except in cases which he considered to involve 'such a gross abuse of the prerogative that both the secretary of state and local public opinion would be likely to support him in the adoption of extreme measures.'

'In all ordinary cases, therefore, in which neither imperial interests or policy were involved, the governor, whatever his own private opinion might be,' was prepared to accept the advice of the minister specially responsible to the colony for the administration of justice. He entirely concurred with Mr. Parkes, 'that the responsibility for the exercise here of the Queen's prerogative of pardon must either, as heretofore, rest solely with the governor, or it must be transferred to a minister, who will be subject in this, as in the discharge of other administrative functions, only to those checks which the Constitution imposes on every servant of the Crown who is at the same time responsible to parliament.' He therefore expressed his desire 'that, for the future, all applications for mitigation of sentences should be submitted to me, through the intervention of a responsible minister, whose opinion and advice as regards each case should be specified in writing upon the papers.'^q

Sir H. Robinson on this prerogative.

^o Com. Pap. 1875, v. 53, p. 638. Mr. Parkes might have said the same of the reign of George IV. See Colchester Diary, v. 8, p. 297. For the constitutional practice in

the present reign, see Martin, *Life of the Prince Consort*, v. 1, p. 141.

^p Com. Pap. 1875, v. 53, p. 638.

^q *Ib.* p. 640.

Ministers agreed in these conclusions ; and a minute of council was passed, dated June 2, 1874, in conformity with the plan proposed by the governor.

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In reporting this decision to the secretary of state for the colonies (Lord Carnarvon), for his approval, Governor Robinson states : ' This is simply the mode in which all the ordinary business of government is conducted ; and I could see no sufficient reason for making any distinction in these cases.' ' It appears to me, too, that the plan determined on meets all the requirements specified in Lord Granville's and Lord Kimberley's despatches on this subject. The papers, in every case, will be laid before the governor for his decision. He will thus have an opportunity of considering whether any Imperial interest or policy is involved, or whether his personal intervention is called for on any other grounds.' If there should be no such necessity, he would of course give effect to the advice of his responsible minister upon the case.

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Adverting to the possible difference of opinion upon such a question between the governor and his advisers—and to Mr. Parkes's contention ' that the refusal of the governor to accept the advice of the minister, in any case of pardon, would necessarily involve his resignation '—Governor Robinson remarks that this argument is, in his opinion, pushed too far. ' Of course, theoretically, such a view is correct ; but I need scarcely point out that, in the practical transaction of business, ministers do not tender their resignations upon every trivial difference of opinion between themselves and the governor.'^r

Lord Carnarvon, in three separate despatches to Governor Robinson, severally dated Oct. 7, 1874, expresses his approval of the foregoing arrangements, which are essentially identical with the practice established, in similar cases, in all other Australian colonies, and with the views of her Majesty's government. But, ' as Mr. Parkes correctly observes, the minister in a colony cannot be looked upon as occupying the same position, in regard of the Queen's prerogative of pardon, as the home secretary in this country. The governor, like the home secretary, is personally selected by the sovereign as the depository of this prerogative, which is not alienated from the Crown by any general delegation, but only confided as a matter of high trust to those individuals whom the Crown commissions for the purpose. Actually, therefore, as well as formally, the governor will continue to be, as he has hitherto been, in New South Wales and in other colonies, the person ultimately responsible for the exercise of the prerogative. But this is quite consistent with

^r Com. Pap. 1875, v. 53, p. 643.

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the further duty, expressly imposed upon him, of consulting his ministers or minister, before he acts.'

In proof of the necessity for reserving to the governor the final decision upon questions that might involve consequences too momentous for the determination of the ministers of any one colony, however large and important, Lord Carnarvon points out that 'the effect upon neighbouring colonies, the empire generally, or foreign countries, of letting loose a highly criminal or dangerous felon to reside in any part of the world, except only that principally concerned to take charge of him, was a step which might clearly and not unreasonably give rise to complaints from without the colony; nor could the recommendation of a colonial ministry, in favour of such a course, be of itself a sufficient justification of it.' Moreover, to release a felon upon any such condition was altogether contrary to the theory now generally accepted: 'that a community should not relieve itself of its worst criminals, at the expense of other countries.' The local enactment which has heretofore authorised the exercise of this right (11 Vic. c. 34) 'ought to be considered as virtually obsolete,' and as an act which 'cannot be too soon repealed.'^s

This decision of the secretary of state, that, while the governor of a colony is bound to consult his ministers upon all applications connected with the exercise of the prerogative of pardon, whether capital cases or otherwise, he remains ultimately responsible for the administration of this prerogative, was accepted in New South Wales, as a reasonable and satisfactory settlement of the constitutional question.^t

Gardiner's case.

Meanwhile, in the year 1872, before the change of practice had been adopted which relieved the governor of personal responsibility in all ordinary cases of applications for pardon, Governor Robinson, in his discretion and independent judgment, had seen fit to release from gaol one Gardiner, a convicted felon, on condition that he should leave the colony. Two years afterwards in June, 1874, this matter was brought before the house of assembly. A motion was made to present an address to the governor, disapproving of Gardiner's release, which was only negatived by the casting-vote of

^s Com. Pap. 1875, v. 53, pp. 676-679. Lord Carnarvon afterwards stated 'that the colonies of New South Wales and [South] Australia have expressed their willingness to repeal this law.' Hans. D. v. 223, p. 1074. And the revised instructions issued to the governor

of South Australia, in 1877, and to the governor-general of Canada in 1878, contained a clause forbidding banishment, as a condition of pardon, except in the case of political offences.

^t Com. Pap. 1875, v. 53, p. 691.

the speaker. But the question was agitated in the country, and numerous petitions were addressed to the governor on Gardiner's behalf. This led his excellency to reconsider the question. After reviewing his former decision, and determining that it ought not to be reversed, he embodied his views in a minute, which he laid, with the petitions, before the executive council. That body, having examined the papers, were of opinion that no grounds existed to warrant them in advising the governor to withdraw the conditional pardon he had given to Gardiner. His excellency accordingly refused to grant the prayer of the petitioners.

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In order to allay the existing agitation in the public mind, and at the same time to acquaint parliament with what had been done, the proceedings of the executive council in this case, together with the governor's minute to council, were laid on the table of both houses by ministers, just before the prorogation, so that the papers might be printed and circulated during the recess.

When parliament re-assembled, this act of laying on the table the governor's minute was taken exception to in the assembly, and an address to the governor, condemnatory of that proceeding, as well as of the tenor of the document itself, was moved and defeated (again) by the speaker's casting-vote. But during the debate the governor was charged, by different members, with having 'insulted and degraded the house by unconstitutional interference and criticism.'^u Shortly afterwards, parliament was dissolved. In the new assembly the attack was renewed, under circumstances which have been already explained in a previous chapter.^v

These repeated and not altogether unsuccessful attempts to render the governor directly amenable to the house of assembly, for acts performed by him upon his personal responsibility as an Imperial officer, were reported by him to the secretary of state, in a despatch dated Nov. 30, 1874. While these attempts had hitherto been defeated, the governor's actions had been exposed to parliamentary criticism, through, as his excellency remarked, 'my having had imposed on me, personally, as her Majesty's representative, administrative functions, independent of my responsible advisers. There are, of course, political duties which the governor, as holding the balance between contending parties, must always, necessarily, perform upon his own independent judgment, such, for example, as the refusal or acceptance of the resignation of the ministry; the selection of a new premier; and the granting or refusal of a dissolution, when asked for. But the late discussions in parliament have, I think, clearly shown that no possible advantage which can be

^u Com. Pap. 1875, v. 53, pp. 680-683.

^v See *ante*, p. 129.

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gained by requiring the governor personally to take the initiative in ordinary administrative acts can compensate for the animadversions to which his proceedings must, in such case, be exposed in the popular branch of the legislature.'

'There is only one way,' his excellency adds, 'in which the governor's action can be kept out of the heated atmosphere of parliamentary discussions, and that is by relieving him, as far as possible, from the duty of taking the initiative in the transaction of administrative business. His action, as regards such details, should, I think, be limited to accepting or rejecting the advice of his ministers. The importance of maintaining this principle appears to have been recognised and acted upon to a greater extent in the neighbouring colonies than it has been in New South Wales.' ^w

In acknowledging the receipt of this despatch, the secretary of state accepted, without hesitation, the governor's explanation of his conduct, to which exception had been taken in the house of assembly, and stated that he should present all the papers on the subject to the Imperial parliament.^x After they were so submitted, a debate arose upon the general question in the House of Lords, wherein a decided concurrence of opinion was expressed in favour of maintaining the ministerial doctrine, as to the right and duty of the governor to exercise a final and independent judgment, as an Imperial officer, upon all questions arising out of the exercise of the prerogative of mercy; but only after he had fully and freely considered the advice of his ministers upon each particular case.^y

Case of Louisa Hunt.

In 1877, the exercise of the prerogative of mercy by the governor of Tasmania, on behalf of a convict named Louisa Hunt, upon the advice of his ministers, and in accordance with the revised instructions issued by her Majesty's colonial secretary, was censured by both houses of the local parliament. Papers on the subject were presented to the parliament in answer to addresses. Whereupon, in each chamber, it was resolved that 'the advice tendered by his ministers to his excellency, and which led to the release of the prisoner Louisa Hunt, was improper, and such as to tend to subvert the administration of justice.' The cabinet, however, did not make this 'a ministerial question.' They did not dispute the competency of the houses to pronounce upon their conduct in the matter, and they accepted the censure; but did not, on that account, resign office. The ministry was weak in parliamentary support, and it fell shortly afterwards, because of the rejection by the assembly of their financial policy. But ministers did not consider that the disapproval

^w Com. Pap. 1875, v. 53, pp. 680-685.

^x *Id.* p. 685.

^y Hans. D. v. 223, p. 1065.

by the houses of the advice they had given upon a question the final disposal of which was vested in the governor, necessitated their resignation of office.^z The 'Hunt case' gave rise to a sharp and acrimonious correspondence between the governor and the chief-justice of the colony, copies of which were transmitted to her Majesty's secretary of state, and elicited a rebuke from that officer to both parties in the controversy.^a

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In 1883, the governor of Tasmania (Sir G. C. Strahan), in reply to an address from the legislative council, for papers in reference to the remission of the death sentence passed on one James Connolly, stated 'that as a general rule it is inexpedient to make public the opinions of members of the executive council,' which are given under an oath of secrecy; but that by advice of his ministers he complied with the present request.^b The governor appears to have overlooked the fact that this request was made in accordance with parliamentary usage and ministerial responsibility, as the previous cases cited in this section have shown.

There is another question of considerable interest and importance, in connection with the administration of the prerogative of mercy which should be noticed: it is in regard to the right of a governor to issue a proclamation of general amnesty to political offenders.

Proclamations of general amnesty.

In the circular despatch addressed by the Earl of Kimberley to colonial governors on Nov. 1, 1871, which treats of the powers vested in the governor of a colony to grant pardons, it is intimated that, inasmuch as in England a pardon is not granted before the trial of an offender, so, with respect to 'the promise of pardon to political offenders or enemies of the state, her Majesty's government are of opinion that, for various reasons, it would not be expedient to insert the power of granting such pardons in the governors' commissions; nor do they consider that there is any practical necessity for a change. If a governor is authorised by her Majesty's government to proclaim a pardon to certain political offenders or rebels, he can do so. If he is not in-

^z Tasmania Leg. Coun. Jour. 1878, App. Nos. 35, 36.

^a *Ib.* 1878-79, No. 118.

^b *Ib.* Aug. 28, 1883.

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structed from home to grant a pardon, he can issue a proclamation, as was done in New Zealand in 1865, by Sir G. Grey, to the effect that all who had borne arms against the Queen should never be prosecuted for past offences, except in certain cases of murder. Such a proclamation would practically have the same effect as a pardon.^c

The issue of a proclamation of amnesty or oblivion for past offences against the Crown and government of the realm is within the undoubted prerogative of the Crown; and an amnesty or pardon may thus be granted by the sovereign either before or after attainder or conviction;^d and also by a colonial governor, acting under instructions from the Crown.^e

Proclamations of amnesty were issued by Lord Durham, governor-general of Canada, in 1838; by Sir George Grey, governor of New Zealand, in 1865; by Sir G. F. Bowen, governor of New Zealand, in 1871; and by Lord Dufferin, governor-general of Canada, in 1875.^f This proclamation granted a full amnesty to all persons concerned in the first insurrection in the North-west, in 1869 and 1870, excepting that the amnesty to Louis Riel and Ambroise Lepine was made conditional on five years' banishment from her Majesty's dominions; and that W. B. O'Donohue was not included in the grant of amnesty. But on Nov. 22, 1877, Lord Dufferin approved of a recommendation from his ministers in council that a pardon, conditional on five years' banishment, from April 23, 1875, should be granted to O'Donohue.^g And after the second insurrection in the North-west, in 1885, Lord Lansdowne issued a proclamation of amnesty to all concerned, saving those undergoing sentence, and any who had committed homicide not in actual warfare.^h

Special law in Upper Canada.

In Upper Canada, after the insurrection of 1837, the provincial parliament passed an act to empower the lieutenant-governor, upon the petition of any person

^c Com Pap. 1875, v. 53, p. 63-4.

^d 1 Inst. 120 a, note 4; 3 Inst. 233. Bishop, Criminal Law, c. 59, on 'Pardon.'

^e Forsyth, Constitutional Law, p. 113.

^f See Canada Off. Gaz. April 24, 1875.

^g Canada Sess. Pap. 1878, No. 55.

^h Canada Off. Gaz. July 17, 1886, p. 68.

charged with high treason before his arraignment, praying for a pardon, to grant him (by and with the advice of the executive council) a conditional pardon; which should nevertheless have the effect of an attainder for high treason, so far as concerned the forfeiture of his property.¹

Proclamations of amnesty.

A despatch from Lieut.-Governor Arthur of Aug. 29, 1838, in relation to this statute, is specially noteworthy as commenting upon the apparently conflicting claims of the governor-general of Canada and the lieutenant-governor of Upper Canada to the exercise of the prerogative of mercy, under their several commissions from the Crown and instructions from the secretary of state.^j Since confederation, the administration of this prerogative has been withdrawn from the lieutenant-governors of the Canadian provinces, and vested solely in the governor-general of the dominion.^k

In New Zealand, by the local act of 1882, the governor in council was empowered to proclaim an amnesty for all offences committed by Maoris, in any past insurrection; and to except any persons or offences from the benefit of the same.¹ But the amnesty afterwards proclaimed by Governor Jervois, in February 1883, was full and complete, and no Maori was excluded from it.^m

We must now revert to the general question as to the constitutional method of exercising the prerogative of mercy in a British colony, for the purpose of pointing out the special instructions which have been given to the governor-general of the dominion of Canada on this subject.

Prior to the confederation of the British North American provinces in 1867, and up to the time of the appointment of the Marquis of Lorne to be governor-general in 1878, the instructions to the governors-general of Canada were identical with those given to other

Its exercise in Canada,

¹ U. C. Stat. 1 Vic. c. 10.

^j U. C. Assem. Jour. 1839, App. v. 2, part 2, p. 625.

^k Canada Sess. Pap. 1869, No. 16.

¹ N. Zealand Parl. Pap. 1883, A. 1, p. 4; Rusden, Hist. of N. Zealand, v. 3, p. 470; also N. Zealand West Coast Peace Preservation Act, 1882.

^m *Ib.* A. 8.

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colonial governors. By virtue of these instructions, the governor was understood to be bound to consult his ministers in all cases of application for the mitigation or remission of sentences, but he remained at liberty to disregard their advice and to exercise the royal prerogative according to his own judgment and upon his own personal responsibility as an Imperial officer.

Patterson's case.

Thus, in September, 1861, the governor-general, Sir Edmund Head, after fully considering in council the case of one Patterson, convicted of murder and sentenced to death, resolved to grant him a reprieve, notwithstanding that the attorney-general and other members of the executive council were adverse to the commutation of the sentence and in favour of permitting the law to take its course. The reasons which actuated the governor in this decision were duly recorded in the minutes of council.^a

Lepine's case.

Again, on Jan. 15, 1875, the Earl of Dufferin, governor-general, informed the dominion minister of justice that, after a 'full and anxious consideration' of the evidence and other papers concerning the trial of Ambroise Lepine for the murder of Thomas Scott, he had decided to commute the capital sentence passed upon Lepine to two years' imprisonment, together with the permanent forfeiture of his political rights. In dealing with this case 'according to his independent judgment and on his own personal responsibility,' the governor reported his reasons for the same to her Majesty's secretary of state.^o Although there appears to have been no formal record in a minute of council of this proceeding, 'full and ample communications' passed between the governor-general and his ministers

^a See the Quebec Morning Chronicle, Sept. 7, 1861. And see Canada Assem. Jour. 1858, App.

^o Can. Gaz. extra, Jan. 19, 1875.

on this subject, and his conduct was entirely approved by the Imperial government.^p

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In November 1875, the correspondence before cited between the colonial secretary and the governor of New South Wales, in reference to the exercise of the prerogative of mercy, was transmitted to the governor-general of Canada and laid before the Canadian parliament.^q

This official communication led to a careful examination of the question by the dominion minister of justice (Mr. Blake); and the expediency of some further alteration of the terms of the governor's commission, and of the royal instructions applicable to the administration of this prerogative, was one of the matters of public interest and importance upon which Mr. Blake proceeded to England in June 1876, at the request of Lord Carnarvon, for the purpose of having a personal conference with her Majesty's ministers.^r

Proposed change in the governor's powers.

At this conference Mr. Blake submitted various reasons, resulting from the growing importance of the dominion of Canada and its relation as a self-governing community to the mother country, which, he contended, would justify the allowance of a larger discretion in the determination of cases by the prerogative of pardon in Canada than would be suitable in Australia or elsewhere. He was of opinion that this prerogative should be exercised in Canada, as a general rule, precisely as it is administered in England; namely, pursuant to the advice of the dominion ministers as well in capital as in non-capital cases. Mr. Blake admitted the difficulty, if not the impossibility, of formulating a special rule on the subject, because cases might occur which would involve Imperial as well as Canadian interests. Such cases, however, would be

^p Hans. D. v. 223, p. 1075; Can. Sess. Pap. 1875, No. 11.

^q Can. Sess. Pap. 1876, No. 116.

^r See *ante*, pp. 110-112.

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rare and exceptional, and might be disposed of as they arose by mutual adjustment, in which due regard should be had to the constitutional powers and relations of the Crown, the governor-general, and the Canadian privy council.

These suggestions were frankly accepted by the colonial secretary, and he expressed his readiness to advise an amendment of the governor-general's commission and instructions in general agreement with Mr. Blake's proposals.^a

After Mr. Blake's return to Canada, further correspondence ensued between the Imperial and dominion governments upon this subject. Drafts of the proposed alterations in the commission and instructions were considered and agreed upon between the ministers of the Crown in Canada and the home government. It was decided, however, to await the appointment of a new governor-general before giving full effect to the intended changes.

New instructions to governor-general of Canada.

Upon the expiration of Lord Dufferin's term of service, he was replaced by the Marquis of Lorne. The new commission and instructions issued upon this occasion were framed in accordance with the conditions agreed upon between the dominion and Imperial governments. As regards the prerogative of pardon, the directions therein contained do not materially differ from those embodied in the revised letters patent issued in 1877, on behalf of South Australia, and which have been already noticed.^b The variations, however, in Lord Lorne's commission and instructions—coupled with the assent expressed by her Majesty's government to the proposition that, in all cases of a merely local nature, the advice of the Canadian ministers in respect to the exercise of the prerogative of pardon, should

^a Can. Sess. Pap. 1877, No. 13.

^b See *ante*, p. 114.

not only be taken, but should prevail — suffice to extend to the Canadian government, upon such questions, the same freedom of action as in all other matters which concern solely the internal administration of the affairs of the dominion.^u

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The new letters patent constituting the office of governor-general of Canada contain no reference to the exercise of the prerogative of pardon; but the accompanying draft of instructions includes the directions heretofore distributed between the commission and instructions, in the following terms:—

We do further authorise and empower our said governor-general, as he shall see occasion, in our name and on our behalf, when any crime has been committed [for which the offender may be tried within our said dominion^v], to grant a pardon to any accomplice, not being the actual perpetrator of such crime, who shall give such information as shall lead to the conviction of the principal offender; and, further, to grant to any offender convicted of any crime in any court, or before any judge, justice, or magistrate, within our said dominion, a pardon, either free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender, for such period as to our said governor-general may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable to us. Provided always, that our said governor-general shall not in any case, except where the offence has been of a political nature, make it a condition of any pardon or remission of sentence that the offender shall be banished from, or shall absent himself from, our said dominion.^w And we do hereby /

^u See the correspondence between the government of Canada and the government of the United Kingdom, upon the subject of the Royal Instructions, prior to Oct. 5, 1878. Canada Sess. Pap. 1879, No. 181.

^v Heretofore, in lieu of the words in brackets, the instructions had said 'within our said colony,' or 'dominion.' But, by the change introduced in the revised instructions, the power to grant a pardon to accomplices is extended to cases where the crime has been committed out-

side of the limits of the dominion, but for which the offender may be tried therein. This alteration was suggested by Mr. Blake, in 1876. See his Report to the Canadian Privy Council, p. 4.

^w This clause does not appear in earlier instructions; but it was deemed by the secretary of state to be obviously wrong to thrust upon other communities a criminal who was regarded as unfit to remain at large in his own country. (See *ante*, p. 356.) In this opinion Mr. Blake fully concurred, while he suggested

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'direct and enjoin that our said governor-general shall not pardon or reprieve any such offender without first receiving, in capital cases, the advice of the privy council for our said dominion, and in other cases the advice of one at least of his ministers,* and in any case in which such pardon or reprieve might directly affect the interests of the empire, or of any country or place beyond the jurisdiction of the government of our said dominion, our said governor-general shall, before deciding as to either pardon or reprieve, take those interests specially into his own personal consideration, in conjunction with such advice as aforesaid.'

Effect of new instructions.

By this last section, the independent judgment and personal responsibility of the governor-general of Canada, as an Imperial officer, are relied upon to decide finally, after consultation with his ministers, in all cases of Imperial interest, or which might directly affect any country or place outside of Canada; while he is at liberty to defer to the judgment of his ministers in all cases of merely local concern.

In any case where the governor-general is authorised to act independently of his ministers, he may, if he thinks fit, remit the matter to the consideration of the secretary of state for the colonies, for the purpose of ascertaining the opinion of her Majesty's government thereon. This was done in 1877, by decision of 'the governor in council,' in the case of Peter Martin.²

The Ontario legislature likewise claims, by statutory

'that it may be just and convenient that the restriction should not be applicable to the cases of political criminals, to whose offences as a rule the considerations which make such a condition obnoxious hardly apply, while public convenience and the tranquillity of the country may occasionally be best consulted by so disposing of them.' (Report in 1876, p. 5.) The colonial secretary approved of this exception. See the correspondence laid before the dominion parliament in 1879.

* In practice, this minister is

understood to be the minister of justice; but for obvious reasons the limitation to any particular minister is not insisted upon. See the correspondence above referred to.

¹ For the Marquis of Lorne's commission and instructions, see Canada Sess. Pap. 1879, No. 14.

² Confidential report of the dominion minister of justice (Mr. Blake), dated March 5, 1877, in correspondence concerning the royal instructions. Canada Sess. Pap. 1879, No. 181.

enactment of 1888, the inherent right in the office of lieutenant-governor of the exercise of the prerogative of commuting and remitting sentences for offences against the laws of the province, over which the legislative authority of the province has jurisdiction.

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case.

The provincial act setting up this claim, 51 Vic. c. 5, entitled 'an act respecting the executive administration of laws of this province,' is as follows :—

Whereas by section 65 of the British North America Act, 1867, it was provided (among other things) that all powers, authorities and functions which under any act of the parliament of Great Britain or of the parliament of the United Kingdom of Great Britain and Ireland, or of the legislature of Upper Canada, Lower Canada or Canada, were before or at the union vested in or exercisable by the respective governors or lieutenant-governors of those provinces should, as far as the same were capable of being exercised after the union in relation to the government of Ontario and Quebec respectively, be vested in and exercised by the lieutenant-governor of Ontario and Quebec respectively, subject, nevertheless, to be abolished or altered by the respective legislatures of Ontario and Quebec, except with respect to such as existed under acts of the parliament of Great Britain, or of the parliament of the United Kingdom of Great Britain and Ireland.

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And whereas by section 92 of the said act, it was provided that in each province of the dominion of Canada the legislature may exclusively make laws in relation to matters coming within the classes of subjects thereafter mentioned.

Therefore her Majesty, by and with the advice and consent of the legislative assembly of the ~~province~~ of Ontario, enacts as follows :—

1. In matters within the jurisdiction of the legislature of the province, all powers, authorities and functions which, in respect of like matters, were vested in or exercisable by the governors or lieutenant-governors of the several provinces, now forming part of the dominion of Canada or any of the said provinces, under commissions, instructions or otherwise at or before the passing of the said act are, and shall be (so far as this legislature has power thus to enact) vested in and exercisable by the lieutenant-governor or administrator for the time being of this province, in the name of her Majesty or otherwise as the case may require ; subject always to the royal prerogative as heretofore.

2. The preceding section shall be deemed to include the power

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of commuting and remitting sentences for offences against the laws of this province, or offences over which the legislative authority of the province extends.

3. Nothing in this act contained shall be construed to imply that the lieutenant-governor or administrator has not had heretofore the powers, authorities and functions in the preceding two sections mentioned.

Reference as to the validity of the act was made to the high court of justice for the province of Ontario by agreement of the federal and local governments.^a

It was contended from the federal point of view that the act in question purports to confer upon the lieutenant-governor powers beyond those established by the British North America Act, and beyond those which it is within the scope of the legislative assembly to confer, according to the limitation imposed on the legislature through the 92nd section of the B.N.A. Act, regarding the office of lieutenant-governor. Also by its intent it declared the meaning of, or designed to amend the B.N.A. Act by its provisions, which was not within the competence of the legislature to do. That the power of commuting and remitting sentences is a prerogative right of the Crown exercisable by the governor-general as directly representing the Queen, over which local legislatures have no jurisdiction. That the exercise of royal clemency is a matter of procedure; and that the 2nd section of the act extends to offences that are only offences under dominion acts.

On behalf of the provincial government, it was argued by the eminent counsel,^b that the act being of a declaratory nature, and enacting only in its provisions in matters purely provincial, attempted nothing beyond the powers of the legislature. That the prerogative of pardon is divisible and passes by right direct from the Crown to the governor-general, or to the lieutenant-governor, as the case may be, but not through the former; in order to render the constitution of each government complete and symmetrical in its working. That the legislative and executive powers conceded, and existing in the provinces prior to confederation, were divided; some assigned to the dominion and others to the provinces; that the B.N.A. Act did not deprive the provincial legislatures of any of

^a Att.-Gen. for Canada v. Att.-Gen. of Ontario, 20 Ont. Rep. p. 223; 19 Ont. App. p. 31.

^b Hon. Edward Blake, M.P. for South Longford, Ireland. The ar-

gument is published *in extenso* in pamphlet form, entitled 'The Executive Power Case.' 8vo. Toronto, 1892.

the powers of local self-government inherent in them, but on the contrary rather increased them, separating between the central and local institutions executive powers, each of the same quality though not of the same extent ; so that local legislatures are in no sense delegates of or acting under any mandate from the Imperial or dominion parliament. That in the clause in the B.N.A. Act, 'the executive government and authority of and over Canada is hereby declared to continue and be vested in the Queen,' the use of the word Canada being wide enough to apply to the executive of the province as well as to that of the federal government. That a lieutenant-governor exercising his deputed functions does so in place of a governor, not in the name of a governor, but in that of the Queen, whose prerogative becomes thus distributed that the sovereign may be represented in the entirety of each constitution. The appointment of a lieutenant-governor being under the great seal, the method of ratifying the sovereign's direct pleasure and will, thereby makes him a Queen's officer to discharge her functions. That the prerogative of pardon not being a personal act of the sovereign, is exercised by the sovereign, or her representative with responsibility in the community which is affected by the act.

Provincial
executive
power
case.

So far the Ontario government has carried its case in the provincial courts, the high court of justice, and court of appeal, the act having been declared *intra vires* of the provincial legislature ; it is now (1893) before the supreme court of Canada for argument.

CHAPTER XII.

IMPERIAL DOMINION EXERCISABLE OVER SELF-GOVERNING
COLONIES: IN MILITARY AND NAVAL MATTERS.

Imperial
regula-
tions for
colonial
governors.

OUR observations on this head will be suitably prefaced by the following extracts from the 'Revised Regulations for the Colonial Service,' published in the Colonial Office List for 1892, pp. 301, 315.

§ II. *Authority of the governor in relation to her Majesty's troops.*

10. The governor of a colony, though bearing the title of captain-general or commander-in-chief, is not, without special appointment from her Majesty, invested with the command of her Majesty's regular forces in the colony. He is not, therefore, entitled to receive the allowances annexed to that command, or to take the immediate direction of any military operations, or, except in case of urgent necessity, to communicate officially with subordinate military officers, without the concurrence of the officer in command of the forces. Any such exceptional communication must be immediately notified to that officer.

11. In the event of the colony being invaded or assailed by a foreign enemy, and becoming the scene of active military operations, the officer in command of her Majesty's land forces assumes the entire military authority over the troops.

11a. In the event of armed insurrection occurring within the colony, or of such general disturbances arising as to render military operations necessary, it will be the duty of the governor to determine the objects with which, and the extent to which, her Majesty's troops are to be employed in their suppression. He will, therefore, issue to the officer in command of the forces instructions as definite as possible on these points. When military operations have been determined upon, and their object and scope have been definitely decided, the responsibility for all details of their conduct will rest solely with the officer commanding the troops.

12. Except in the case of invasion or assault by a foreign enemy, or of the colony becoming the scene of military operations, it is the duty of the governor to determine the objects with which and the extent to which her Majesty's troops are to be employed. He will, therefore, issue to the officer in command of the forces directions respecting their distribution and their employment on escort and other duties required for the safety and welfare of the colony.

12*a*. In all the matters referred to in the two last preceding regulations, the governor will consult as far as possible with the officer in command, and will incur special responsibility if he shall direct the troops to be stationed or employed in a manner which that officer shall consider open to military objection.

13. The governor, as the Queen's representative, will give the 'word' in all places within his government.

14. On the other hand, the officer in command of the forces will determine all military details respecting the distribution and movement of the troops and the composition of the different detachments, taking care that they are in conformity with the general directions issued to him by the governor.

15. The officer in command of her Majesty's land forces is alone charged with the superintendence of all details connected with the military department in a colony, the regimental duty and discipline of the troops, inspections, and summoning and holding courts-martial, garrison or regimental, and the granting leave of absence to subordinate military officers.

16. He carries into execution, on his own authority, the sentences of courts-martial, excepting sentences of death, which must first be approved, on behalf of the Queen, by the officer administering the civil government.

17. He makes the officer administering the civil government returns of the state and condition of the troops, of the military departments, of the stores, magazines, and fortifications within the colony, and furnishes duplicates of all such returns of this nature as he may be required or may see occasion to send to the military authorities at home, or to any officer under whose general command he is placed.

18. On the receipt of the Army (Annual) Act, the officer in command of her Majesty's land forces communicates to the civil authority the 'general orders' in which it may be promulgated.

19. The above regulations will hold good, though the governor may be a military officer senior in rank to the officer in command of the forces.

20. If several colonies are comprised in one military command,

Colonial
regula-
tions.

the officer in command of the whole may transfer troops from one colony to another on an application from the governor of the colony to which the troops are sent, transmitted to him either through the governor of the colony in which he is serving, or through the officer commanding the forces in the colony for which troops are required. But the officer in command must, in all cases, consult with the governor of the colony from which the troops are sent, and will incur a special responsibility if he sends them away without that governor's consent.

21. For the purpose of the eleven last preceding regulations colonies comprised under one government-in-chief are to be treated as a single colony.

§ III. *Military correspondence.*

Military
correspon-
dence
with
Imperial
govern-
ment.

197. The governors of colonies, commanding her Majesty's troops therein, must separate their correspondence with the secretary of state for the colonies, and the secretary of state for war, in the following manner :—

198. Whatever relates to the discipline of the troops, or to the employment of them in any ordinary and established service, or to the relief of the troops after their time of local service shall have expired, or to the interior economy of her Majesty's land forces, will properly form the subject of correspondence with the secretary of state for war exclusively.^a

199. In the event of actual hostilities with any foreign enemy, or of any extraordinary employment of the troops for the maintenance of the public peace, such occurrences must be reported both to the secretary of state for war and to the secretary of state for the colonies.

200. In the event of its being thought necessary to make or to advise any military convention with the officer in command of the troops of any foreign power, a governor commanding her Majesty's troops will, at the same time, report to the secretary of state for the colonies, and to the secretary of state for war, the measures which he may have so taken, or those which he may wish to recommend for adoption.

201. In case it should be necessary, in order to render the governor's military reports intelligible, to make reference, in his correspondence with the secretary of state for war, to topics connected with his civil authority, he will in every such case at the

^a See Circular Despatch to governor of Canada relative to employment of Imperial soldiers under colonial governments. Can. Dom. Gaz. April 9, 1881.

same time bring under the notice of the secretary of state for the colonies the questions of civil government to which he may thus have had occasion to advert.

202. As any attempt to define the limits of a governor's civil and military correspondence may, from the nature of the case, be imperfect, and may omit to provide for some unforeseen exigency, he will best fulfil the joint pleasure of the secretary of state for war and of the secretary of state for the colonies by conducting his civil correspondence exactly as he would conduct it if he possessed no military command, and *vice versa*. The two functions of governor and of commander of the forces, though for the time combined in the same person, should be regarded in this respect as entirely separate, and the reports made by the governor in each capacity should be made precisely in the same manner as if that combination of powers did not exist.

203. The preceding instructions will apply also to the governor's correspondence respecting the service of the commissariat.

204. The respective officers employed under the war office are in all cases without exception to give timely notice to governors of any communications which they may intend to send home, affecting such governors or the orders given by them, so that her Majesty's government may be simultaneously made acquainted with the opinions of the governors, and with the opinion of those officers on any matter on which it is requisite that the views of both should be known.

205. When the civil governor of a colony shall have occasion to report upon, or bring under the consideration of the secretary of state for the colonies, matters which involve military as well as civil considerations, or which require the decision or concurrence of the secretary of state for war, the governor will first communicate with the officer in command of the forces in the colony respecting the matters in question; and, having obtained that officer's opinion or observations thereupon, he will transmit the same with his own report to the secretary of state for the colonies.

206. The officer in command of the forces is similarly instructed to obtain the opinion of the governor before reporting to the secretary of state for war, or to any officer under whose general command he is placed, on any matter which involves civil as well as military considerations, or which cannot be decided without reference to the secretary of state for the colonies.

207. The officer in command of the forces has been instructed to send to the governor duplicates of all reports on whatever subjects, other than those relating to discipline and the routine of the service, which he may have occasion to send to the secretary of state for war

Colonial
regula-
tions.

or to any officer under whose general command he is placed. In case the governor considers that these reports require the consideration of the secretary of state for the colonies, he is to forward the duplicates with his observations by the same mail which conveys the original report to the secretary of state for war.

§ IV. *Naval correspondence.*

Naval
correspon-
dence.

208. Governors of colonies should communicate with officers of her Majesty's navy, and should convey notices of different kinds to commanders of foreign vessels in colonial waters, in the following mode :—

209. The governor will write in his own name to any senior naval officer (that is to say, the senior officer then within his immediate reach), holding the rank of flag-officer, captain, or commander, but will communicate with any senior officer of lower rank through his private secretary. In no case will he communicate through the colonial secretary, whose functions are of a different character, and whose office should not be the place of deposit for communications between the governor and officers in command of her Majesty's naval forces.

210. Any notice or direction, conveyed by the governor's authority to the commander of any foreign vessel, should be conveyed through the officers of the colonial government, and not through the officers of her Majesty's navy, whose intervention should not be applied for, unless the directions conveyed through the ordinary channel should fail to produce their effect.

Origin of
existing
rules.

The constitutional principles asserted in the preceding regulations were not ascertained and put into force until the necessity for strict rules upon the subject had become unmistakably apparent.

During the progress of the Maori war in New Zealand in the years 1865 and 1866, differences occurred between the governor of the colony and the colonel commanding one of the Queen's regiments therein, which were seriously aggravated in consequence of the defective rules then in operation in regard to military correspondence between army officers and the Horse Guards during the existence of a state of war in a colony. This case has been recorded in a previous

section.^b It led to the adoption of the revised rules above set forth, which are sufficiently comprehensive and explicit to meet all contingencies.

Another question, more momentous in its scope and consequences, has arisen in several British colonies. It is to determine the exact relation of the governor, in a colony possessing 'responsible government,' towards the Imperial authorities on the one hand, and towards the local administration on the other, in the control of military matters. Difficulties have presented themselves in different places upon this question, but they have been generally surmounted, and a good understanding now prevails everywhere upon the subject.

Position
of a
governor
in military
matters.

By virtue of his commission from the Crown, a colonial governor is usually and appropriately invested with the position of commander-in-chief of all local forces raised within the colony. His relation to her Majesty's regular army or navy depends upon the nature of his instructions from home, as hereinbefore provided. If a military officer commissioned with supreme command be in the colony, he necessarily controls all military operations, though he is bound to act in co-operation with the governor, and in certain matters to acknowledge his superior authority. These points, however, have all been definitely arranged by the above mentioned official regulations.

In New South Wales, pursuant to the Volunteer Force Regulation Act of 1867^c (31 Vic. No. 5), the governor was appointed to be commander-in-chief of the colonial volunteers; and certain specified duties are imposed upon him in relation to the volunteer force.

The governor's military powers in New South Wales.

In 1869, Sir William Manning, the colonial attorney-general,

^b See *ante*, p. 134.

^c This act is superseded by the 'Military and Naval Forces Regulation' Act of 1871. In 1885, New South Wales despatched and main-

tained a contingent of her artillery and infantry forces for service with her Majesty's regular army in Egypt. N. S. W. Act 48 Vic. No. 28.

Governor's military authority.

gave it as his opinion that the governor was required under this statute 'to act prerogatively on her Majesty's behalf,' and to exercise the functions assigned to him 'upon his own responsibility,' without reference to his executive council, upon the ground that the duties in question were analogous to those which in England appertained to the commander-in-chief, and not to the secretary of state for war.^d

Case of Rossi.

In 1873, Captain F. R. Rossi, a volunteer officer of this force, was complained of before the legislative assembly, for conduct unbecoming in a man entrusted with the command of a body of citizen soldiers. He was tried for his offence, by a select committee of the house, who recommended that he should be dismissed from office.^e The house concurred in this report, and transmitted it to the governor for his consideration and approval. The governor (Sir Hercules Robinson) replied by message, in which he declined to carry out the recommendation of the committee, inasmuch as its proceedings were contrary to law. His excellency pointed out that the volunteer act provided that any inquiry into the conduct of a volunteer officer should be conducted by a court assembled by direction of the governor, and composed exclusively of officers. He added that he had carefully investigated the charges against Captain Rossi, and had embodied his conclusions upon the case in a minute, which he had laid before his responsible advisers. Acting by their advice, as well as on his own behalf as commander-in-chief, he was prepared to direct the assembling of a court of inquiry, under the statute, to examine the complaint against this officer. Whereupon, after a protracted debate, the legislative assembly rescinded their resolution for the adoption of the report of the select committee.^f

In the course of debate on this question, Governor Robinson's conduct was animadverted upon, and he was charged with having put himself into collision with the house. His excellency took no notice of these observations at the time; but afterwards, when writing to the secretary of state for the colonies (the Earl of Carnarvon), on Nov. 30, 1874, upon a kindred topic, he referred to these injurious reflections, and justified the course he had adopted upon this occasion.

Commenting upon the incongruity of devolving upon the governor personally the duty of taking the initiative in the transaction of any sort of administrative business, while he owed no personal

^d New South Wales, Votes and Proceed. Leg. Assem. 1873-74, v. 3, p. 69.

^e New South Wales Assem.

Jour. 1872-73, v. 1, pp. 314, 1325.

^f *Ib.* 1873-74, v. 1, pp. 170, 220, 249.

responsibility to the local parliament, his excellency remarks that 'it seems somewhat inconsistent to entrust to her Majesty's representative, who is not responsible to parliament, certain special duties apart from his advisers, and then, when he exercises his functions in the manner which in his judgment best accords with the honour and dignity of the Crown, to complain that his view does not command the unanimous approval of the popular branch of the legislature.'^g

Governor's military authority.

In the same despatch, Governor Robinson points out that elsewhere—'in Victoria, for example—the volunteer act imposes the duties which here devolve personally upon the governor as commander-in-chief, upon the governor with the advice of his executive council; so that responsibility for the exercise of functions in military, as in all other local matters, devolves there upon the ministers.'^h Practically, the governor exercises no more authority, in military business in Victoria, than he does in the routine of any other department of local administration.

Governor's powers in Victoria.

In Canada, from the period of confederation, this question has received a satisfactory solution. In Canada.

Pursuant to the fifteenth section of the British North America Act of 1867, 'the command-in-chief of the land and naval militia, and of all naval and military forces of and in Canada, is vested in the Queen, and shall be exercised and administered by her Majesty personally, or by the governor as her representative.'ⁱ

This is the first clause in the Canada militia act of 1868; and it secures the exercise of all powers under that act in a constitutional manner. Those matters which are of Imperial direction, and concern the Queen's regular army or navy, whilst serving in Canada, are subject to the control of the Imperial authorities: whilst those which concern the disposition and management of local forces are regulated by the governor-general, with the advice and consent of his privy council or cabinet.

These principles are embodied in the Canada militia act, consolidated and amended in 1883, which likewise provides for the occurrence of actual hostilities, and insures unity of action in such an emergency by the following enactment: that, 'whenever the militia

^g Com. Pap. 1875, v. 53, p. 684.

^h *Ib.* p. 685.

ⁱ Canada Militia and Defence Act 1868, 31 Vic. c. 40, and see consolidating and amending act of 1883. But see *Holmes v. Temple* (Queb. Law Rep. v. 8, p. 351), which decides that Imperial military legislation does not apply to Canada, except as it concerns the militia

force, pursuant to the dominion law. In *Holbrow v. Cotton* (*ib.* v. 9, p. 105) it was decided that all matters of a purely military character affecting the active militia of Canada are to be dealt with by the military authorities, and that military duty and discipline are cognisable only by a military tribunal and not by a court of law.

Govern-
ment's mili-
tary au-
thority.

or any part thereof are called out for active service, by reason of war, invasion, or insurrection, her Majesty may place them under the orders of the commander of her regular forces in Canada.'^j This has always been done, upon the occurrence of any serious disturbances in the dominion, although the clause does not make the practice obligatory.

By the sixty-fourth section of the acts 1868 and of 1883, the Canadian militia are subject to the Queen's regulations and orders for the army, and to all other Imperial laws applicable to her Majesty's troops in Canada, which are not inconsistent with this statute.^k

Minister
of militia.

The act aforesaid authorises the appointment by the governor of Canada of 'a minister of militia and defence, who shall be charged with and be responsible for the administration of militia affairs, including all matters involving expenditure, and of the fortifications, gunboats, ordnance, ammunition, arms, armouries, stores, munitions, and habiliments of war, belonging to Canada.' This minister 'shall have the initiative in all militia affairs involving the expenditure of money.' He is assisted by a deputy minister, and subordinate officers.

General
command-
ing Cana-
dian
militia.

By an amendment of the law, passed in 1875, it is enacted that 'there shall be appointed to command the militia of the dominion of Canada an officer holding the rank of colonel or superior rank thereto in her Majesty's regular army, who shall be charged, under the orders of her Majesty, with the military command and discipline of the militia, and who, while holding such appointment, shall have the rank of major-general in the militia.' The duties of this officer are analogous to those performed in England by the commander-in-chief of the British army; and he is, in like manner, subordinate to the civil power, and subject to the direction of the governor-general through the minister of militia and defence.

Generals
command-
ing in
Austra-
lian colo-
nies.

A similar arrangement for obtaining from England the services of an Imperial officer, on the active list, to take command of local forces has been adopted in Queensland and Victoria; while South Australia, New South Wales and Tasmania have retired army officers in command of their forces.

In South Australia, in 1888, some difficulty arose in obtaining the sanction of the war office to the appointment of Major-General

^j Canada Militia and Defence for Militia of Dom. of Canada; also Act 1868, 31 Vic. c. 40, sec. 61 (8). Can. Off. Gaz. Jan. 14, 1882.

^k See Regulations and Orders

Downes, C.M.G.—a retired colonel in the army—to the office of commandant of the forces in that colony. The secretary of state for war stated as his objection to such a proceeding that in 1887 a similar case had arisen in Canada, when inquiry was made if there was anything to prevent Major-General Sir F. Middleton retaining his appointment in the command of the militia of Canada after having been placed on the retired list. The reply in this case was that there was no legal objection, but there were strong reasons against such a course, as it was very essential that the military systems, organisations, and armaments of the Imperial government and of the colonies should, as far as possible, be uniform. To promote this scheme it was considered desirable that the chief command of the colonial forces should be drawn from officers of the Imperial service on the active list, who are thoroughly in touch with all the latest improvements in the Imperial army. This policy of the war office was pursued in the interests of the colonies, to enable their forces to act in concert with Imperial troops in the event of their supplying contingents to be placed at the disposal of the mother country, as was done in the Soudan campaign. For these reasons the secretary of state for war did not see his way clear to give his sanction to Major-General Downes' appointment.¹ The government of South Australia was not satisfied with this refusal, and claimed that the right of selection rested with the colonial government, and further expressed itself as earnestly desirous of retaining the services of this officer, who possessed the confidence of the government, and on a former occasion as commandant had won the esteem, not only of the officers and men, but of the public generally of the colony.

General
Downes'
case.

The controversy was ended by General Downes being permitted to retain the office, but forfeiting his retired pay while holding the appointment.^m

In a report made on the reorganisation of the volunteer force in New Zealand in 1882, the policy of obtaining an Imperial officer was recommended.ⁿ It was again urged in 1890 by Major-General Edwards in his report on the military forces and defences of that colony. He says, 'A commandant should be appointed who would be responsible for the discipline of the troops, their preparation for active service, and, in case of attack, for the disposal of the forces to resist it. The officer selected for this duty should have a thorough knowledge of his profession, and I recommend that application be

¹ Correspondence in regard to employment of Major-general Downes, Com. Pap. 1890, v. 43, p. 178.

^m *Ib.* p. 189.

ⁿ N. Zealand Pap. 1882, App. H. 10, p. 3; *ib.* 1883, App. H. 17. See also Queensland Leg. Coun. Jour. 1878, p. 233.

made to her Majesty's government for the services of an officer as commandant. Considering the frequent changes which take place in the art of war, it is desirable that this appointment should be made for not more than five years.'^o

Co-operation between Imperial and colonial troops.

In the event of the occurrence of actual hostilities, necessitating the active service of the Canadian militia and the joint action of the local forces of the dominion with her Majesty's regular troops, the foregoing provisions of the Canadian militia law, taken in connection with the Imperial regulations above cited, would suffice to secure harmonious co-operation between both forces.

It only remains to consider the most suitable method of giving practical effect in all the colonies to these general principles. This we may learn from the following remarkable case, wherein the whole question of military discipline and subordination was thoroughly sifted and accurately determined:—

Cape of Good Hope.

In November 1877, the colony of the Cape of Good Hope was threatened with disaster, from a war which had broken out on her northern frontier with certain Kaffir tribes, and also from the simultaneous existence of a Kaffir rebellion in the eastern provinces. In this emergency, the governor (Sir Bartle Frere) was of opinion that it was necessary to aid the colonial volunteer force by additional Imperial troops. Accordingly, he addressed a minute on the subject to his ministers, in which he pointed out the need for reinforcements, and likewise the importance of an improved organisation and control of the colonial military establishment.

Pre-
tensions of the Cape ministers.

The colonial premier (Mr. now Sir J. C. Molteno), in reply to the governor's memorandum, asserted his belief that the colonists were able to help themselves without assistance from her Majesty's regular army, whose presence in the colony tended, he thought, to depress the spirit of the people, from a dread of military, or rather of Imperial, domination. He therefore advised the withdrawal of her Majesty's troops from the colony. He insisted, moreover, upon the right of the colonial cabinet to undertake the entire management of the colonial forces; to place the same in charge of a colonial commandant-general, who should be uncontrolled by any Imperial military authority; and that the governor himself should refrain

from interference, inasmuch as he 'has no special powers over colonial forces as commander-in-chief.' This arbitrary assumption of power was accompanied by an intimation to the governor that one of the ministry (the commissioner of crown lands) had been deputed to act as commandant-general, in command of all colonial forces whatsoever, 'under the sole control and direction of the colonial government.'

Governor's military authority in the Cape.

In answer to these pretensions, the governor denied the existence of the alleged dissatisfaction in the colony at the presence therein of an Imperial military force ; he protested against the scheme of his ministers for the direction of the local volunteers, &c., as being illegal and unconstitutional ; and he referred to the reasonable and constitutional practice which had hitherto prevailed since the outbreak of hostilities, whereby 'the governor and commander-in-chief' was in the habit of meeting the general commanding the forces, and two or three of the responsible ministers, for daily consultation and agreement, so that by their joint action and concert all necessary military measures might be authorised and determined upon. The governor furthermore contended that the distinction drawn by Mr. Molteno between Imperial and colonial forces was entirely imaginary, because while serving in the colony all her Majesty's forces whether colonial or Imperial are subject to the authority of 'the governor and commander-in-chief,' who is the chief military executive, and who is himself bound, on all questions affecting the colony, to receive the advice of his responsible ministers, and not to act in opposition thereto without valid reasons, which he must place on record. The governor is also bound to warn his ministers of the consequences of any advice they may offer, when he sees danger from proposed changes, and to report to the secretary of state any important changes in contemplation.

'Admitting to the fullest practical extent that "the governor acts solely by and with" the "advice" of his ministers,' Governor Frere declared his conviction that if, under present circumstances, he should accept the advice tendered to him, to send away the Imperial troops and to trust for the suppression of the rebellion entirely to volunteers, with the idea 'that such advice was in accordance with the wishes of parliament, or would be approved by the parliament of this colony,' he 'would be fitter for a lunatic asylum' than for the office he had the honour to fill.

But ministers still persisted in adhering to their expressed opinions in this matter and proceeded to carry them out, by directing certain military operations without the sanction either of the governor or of the general in command. The general, however, entered a formal protest against this proceeding.

Governor's military authority in the Cape.

Ministers also caused to be inserted in the official gazette divers military appointments and promotions which had not been previously submitted for the governor's approval. At first these appointments were made in the governor's name ; subsequently they were gazetted without any reference to his authority.

Dismissal of ministry by Governor Frere.

After repeated remonstrances with his ministers for their illegal and unwarrantable conduct, and after ascertaining that they persisted in continuing in office, declaring that they were only accountable to parliament for their public conduct, the governor at length, on Feb. 2, 1878, notified the premier (Mr. Molteno), by a letter sent through a principal officer of the civil service, that he could no longer consent to retain them as his advisers, and that they would remain in office only until their successors were appointed.

Freely admitting that the governor, in his capacity of commander-in-chief, 'is bound on military matters, as on all others, to take the advice of ministers, who have practically the same power of control as her Majesty's ministers exercise over the army in England ;' and that 'through the governor and regular gradation of military subordination, every one of her Majesty's officers and soldiers on active service in the country,' 'without distinction between "colonial" and "Imperial" troops,' 'is accountable to ministers and directly controlled by them,' his excellency nevertheless protested against the assumption by one of his ministers, without the sanction of the Crown or of the colonial parliament, of the position and powers of a 'minister of war, irresponsible to the governor, and as a general directing forces in the field uncontrolled by and irresponsible to any military authority.'^p

On Feb. 5 and 11, Governor Frere addressed despatches to her Majesty's secretary of state for the colonies, in which he narrated the preceding events, and mentioned that he had entrusted Mr. J. G. Sprigg, the leader of the opposition in the assembly, with the task of forming a new administration.

In his reply, dated March 21, the colonial secretary expressed his full reliance on the governor's judgment, and did not question the propriety of his conduct in dismissing his late ministers, a step which appeared to have been unavoidable. Whilst endorsing the opinions expressed by the governor, in denying the right of his ministers to appoint an officer unknown to the constitution, unauthorised by parliament, and in opposition to the judgment of the

^p The points included in the above pages are extracted and epitomised from the voluminous correspondence on the subject which was presented to the Imperial parliament in July, 1878. Com. Pap. 1878, v. 56, pp. 1, 255, 373, and to the Cape Assembly, in May of the same year. Cape Assem. Votes, 1878, Annex. A. 2, 4-6.

governor, and to assign to him functions which would give him paramount authority, greater than that of the governor himself, in military matters, the secretary proceeded to point out that the peculiar position occupied by the governor, as the Queen's high commissioner, with powers in respect to adjacent territories which were not limited by the system of responsible government, as established at the Cape,¹ entitled him to special consideration and authority, in respect to his lawful endeavours to preserve peace in her Majesty's possessions in South Africa, and to prevent any irruption of hostile tribes into those possessions. It was therefore the more surprising that, when differences of opinion arose as to the proper conduct of the war, the local ministry should have hesitated to yield their opinions to those expressed by the governor.

Governor's military authority in the Cape.

'In civil matters lying entirely within the Cape colony, I desire of course that the responsibility of your ministers, for the time being, should be as full and complete as in other colonies under the same form of government, but in affairs such as those in which you have been recently engaged, your functions are clearly defined by the terms of your commission.' In conclusion, the secretary of state declared it to be 'of the first importance that the earliest possible opportunity should be taken of affording such full explanations to your parliament as may enable a clear and impartial judgment to be formed upon the course adopted.'^r

In the opinion of the governor, concurred in by his new ministers, the state of public business did not admit of parliament assembling before May 10. This day was accordingly chosen. On the very day parliament opened, papers and correspondence respecting the dismissal of the Molteno ministry were laid before the Cape parliament.

Meanwhile, the new premier, Mr. Sprigg, in his address to his constituents upon his acceptance of office, justified the act of the governor in dismissing the preceding administration, on the ground that, in the opinion of his excellency, they were endeavouring to carry on the government by unconstitutional means, to which he could not assent; 'that while acknowledging the governor to be commander-in-chief of the Imperial troops in the colony, it was

Harmony restored by new ministry.

¹ The office of Queen's high commissioner for South Africa, as we have elsewhere shown, was held by the governor of Cape Colony under a separate commission, which vested peculiar and very extensive powers in the holder thereof. See *ante*, p. 99. This office was not necessarily conferred upon the go-

vernor of the Cape; in May, 1879 (Sir Bartle Frere continuing in office as governor and high commissioner of the Cape of Good Hope and adjacent territories), General Sir Garnet Wolseley was appointed high commissioner for the eastern portion of South Africa. See *post*, p. 390.

^r Com. Pap. 1878, v. 56, p. 134.

Governor's military authority in the Cape.

contended that his excellency did not hold that position with reference to the colonial forces, and that the ministry were entitled to direct the movements of the colonial forces, not by way of advice to the governor, but upon their own responsibility alone, so that the governor and the general commanding her Majesty's forces were kept in ignorance of the proposed movements of the colonial forces, no joint action taking place, but each branch of the military forces in the country working in ignorance of the plans and intentions of the other.'

Mr. Sprigg declared his conviction 'that the only chance of carrying on the war successfully was by the different branches of the government working in harmony.' For his own part, he said that he was in unison with the governor 'as to the proper and constitutional course to be pursued.' The future conduct of the war would rest with himself, as premier; the governor had placed in his hands the Imperial equally with the colonial troops. To insure unity of action, he had adopted the following method. He meets the governor and the general commanding the forces in the executive council, from time to time. The heads of the colonial forces are invited to assist in these deliberations; and, upon the joint authority of the governor and of the premier, the general is instructed what to do. The general is placed in chief command over the colonial as well as the Imperial troops. All military reports are made to the general, who communicates the substance of them to the premier. The commander of the colonial forces reports direct to the premier. This arrangement, he believed, would insure harmonious co-operation between the civil and military authorities in a constitutional manner.^s

It should be added that, in conformity with the 'regulations of the colonial service,' above cited,^t the general commanding her Majesty's forces reports direct to the secretary of state for war upon questions concerning the Imperial troops under his command; but that he afterwards sends a copy of his despatches on military operations in the colony to the governor, for his consideration and approval.^u

Conduct of Governor Frere impugned.

The papers transmitted to the Cape parliament by the governor, in explanation of the events which led to the dismissal of the Molteno ministry, were far more detailed and complete than would be desirable under ordinary circumstances, or than was in accordance with English precedent. But the new ministry were of opinion that a full and unreserved publication of this correspondence was necessary,

^s Com. Pap. 1878, v. 56, p. 111.

^t See *ante*, p. 372.

^u Com. Pap. 1878, v. 56, p. 121;

ib. p. 281.

in order to justify their own act, in coming forward, at a very serious crisis and at great disadvantage to themselves, to save the colony from the most serious disasters. Moreover, no form of proceeding is followed in the Cape legislature analogous to an address in reply to the speech from the throne, nor any similar convenient opportunity afforded for ministerial explanations or for preliminary trials of party strength.^v

Governor's military authority in the Cape.

After the presentation of these papers to the Cape assembly, Mr. Merriman, a prominent member of the late ministry, moved to resolve : '(1) That, in the opinion of this house, the control over the colonial forces is vested in his excellency the governor only, acting under the advice of ministers ; (2) That it was not within the constitutional functions of his excellency the governor to insist on the control and supply of the colonial forces being placed under the military authorities, except with the consent of ministers ; (3) That the action taken by his excellency the governor in that matter has been attended with results prejudicial to the colony, and has delayed the termination of the rebellion.'

This motion led to a protracted debate, at an early stage of which Mr. Speaker called attention to it, and ruled 'that the second and third paragraphs thereof could not be entertained by the house in the form in which they were presented, it being contrary to constitutional principle and parliamentary practice to move any direct censure on his excellency the governor as the representative of the sovereign, and it being held, by the authorities on parliamentary government, that the ministry in office are responsible for the action of his excellency the governor.' After discussion, the order of the day for resuming the debate on Mr. Merriman's motion was read, whereupon Mr. Speaker stated that, according to the ruling he had just submitted to the house, only the first paragraph of the said motion was at present before it. The debate on the first paragraph was then resumed.^w

At a later sitting of the assembly, leave was obtained by Mr. Merriman to amend his motion, by the reintroduction of the second paragraph (merely changing the word 'was' into 'is'), and by substituting for the third paragraph the following in lieu thereof : 'That the assumption of the command of colonial forces by Sir A. Cunynghame [her Majesty's general in command of the regular troops in South Africa] in January last, contrary to the advice of ministers, was not justified or advisable under the existing circumstances.' To this motion an amendment was moved to resolve that

^v Com. Pap. 1878, v. 56, p. 187.

^w Cape Assem. Votes and Proc. May 29, 1878.

Governor's military authority in the Cape.

'the house, having before it the papers connected with the late change of ministry, does not see that the doctrine that the governor controls the colonial forces under the advice of his ministry has been called in question by the governor, but, on the contrary, is strongly affirmed ; and the house is of opinion that, under all the circumstances of the case, the removal from office of the late ministry was unavoidable.'^x

On June 6, 1878, the foregoing amendment was agreed to, on a division, by a vote of thirty-seven to twenty-two ; a vote which was the more decisive in recording the sense of the house in favour of the new administration, from the fact that, in the preceding session, the Molteno ministry had been able to command a good working majority.^y

His action approved by the Cape assembly.

Mr. Merriman's motion ingeniously evaded the actual facts of the case in relation to the dismissal of the Molteno ministry. It made no reference to the avowed reasons which had induced the governor to change his constitutional advisers, and refrained from raising a distinct issue condemnatory of the circumstances under which the new administration had accepted office. This issue was, however, directly embodied in the words of the amendment agreed to by the house, which declared that, 'under all the circumstances of the case, the removal from office of the late ministry was unavoidable.'

Governor Frere's sentiments in respect to Mr. Merriman's resolutions are expressed in his despatch to the colonial secretary, dated May 21, 1878. These resolutions, he observes, 'are well calculated to embarrass the present ministry, whilst raising no issue directly implicating them. To the first resolution no reasonable objections can be offered on constitutional grounds : . . . it is a simple truism. It may be said that the second resolution is a necessary corollary from the first, provided the true version of the facts which took place be accepted. But I have no reason to suppose that this is the meaning intended by the framer of the resolutions. He probably intends to imply that the governor insisted on the control and supply of the colonial forces being placed under military authorities, without the consent of ministers, and that in so doing the governor exceeded his constitutional functions. This would, however, be quite inconsistent with facts, as I read them. It is, I believe, the constitutional duty of the governor and commander-in-chief to guard against such a dangerous anomaly as a divided command of military forces, operating for a common object, in one area of operations ; and if ministers insisted on such a divided command, it would, I believe,

^x Com. Pap. 1878, v. 56, p. 582.

^y Cape Assem. Votes, 1877, *passim* ; *ib.* 1878, p. 94.

be the governor's duty to prevent, by all constitutional means in his power, their imperilling the safety of the state by any such division of authority and responsibility. But, as a matter of fact, in what was actually done by the governor in the present case, I can see no unconstitutional proceeding whatever, unless Mr. Merriman is prepared to deny the constitutional power of the governor to inform ministers that they have lost his confidence, and to summon other ministers to office, subject to the necessity of their securing the support of parliament.'^z

Governor's military authority in the Cape.

From the first outbreak of the war, the command of all colonial forces in the field was, with the consent of ministers, vested in General Sir Arthur Cunynghame. It was not until four months afterwards that the governor had any formal and conclusive intimation of their intention to adopt a different course of proceeding. He 'then exercised his undoubted constitutional function of informing ministers that they had lost his confidence, and that they only held office until their successors could be appointed. Their successors were appointed, and entirely concurred in the action taken by the governor.'^a

In a subsequent despatch to the colonial secretary, dated June 18, 1878, Governor Frere reported the decision of the Cape assembly upon Mr. Merriman's resolutions, and made mention of the general approval expressed by the colonial press of the result, which amply justified 'the position of the assembly as the constitutional guardian of the rights of the colony.' He adds: 'After such a decisive expression of the opinion of the assembly and of the country, it is hardly necessary that I should further discuss the constitutional question. Her Majesty's government will, I trust, be now satisfied that, in the extreme step taken, I did not go beyond what, in the estimation of the colony and its representatives, was necessary to uphold the authority of the Crown, as constitutional head of all the armed forces of the colony, and guardian of the rights of the people against unconstitutional encroachments of any kind, when circumstances did not admit of an immediate appeal to the parliament of the colony.'^b

In reply to the foregoing despatch, the secretary of state for the colonies, in a despatch dated July 25, 1878, states that he 'learns with much satisfaction that the colonial parliament has expressed, in a decisive manner, its approval of the action which, reluctantly, and under very peculiar circumstances, you had found yourself obliged to take with respect to your late ministry.' He concludes by saying: 'It affords me great pleasure to convey to you, on the part of

Governor Frere's action approved by colonial secretary.

^z Com. Pap. 1878, v. 56, p. 252. Nineteenth Cent. v. 4, p. 1069.

^a *Ib.* pp. 252, 253. And see the ^b *Ib.* p. 583.

her Majesty's government, their warm approval of your conduct, both generally and in this particular case, and their thanks for your unceasing and successful efforts to reduce to order that administrative system which you found wholly unequal to the requirements of a grave emergency.'^c

Supremacy of the Crown in military matters.

Apart from the value of the preceding case, in the light which it reflects upon the constitutional relations of a governor towards his responsible advisers, it is also useful as indicating the proper steps which should be taken to 'uphold the authority of the Crown as constitutional head of all the armed forces' in a British colony.

In 1881 the ministry in New Zealand appear to have assumed a similar attitude towards the governor in asserting their right 'to move and employ bodies of local troops without any reference, even of a formal character,' to the governor. But their unconstitutional pretensions were exposed and properly rebuked by a local judge, in his charge to a grand jury.^d

In affairs of peace and war, which are essentially of Imperial concern, the supremacy of the Crown must be everywhere maintained inviolate. The governor in every colony is the representative of the sovereign in the administration of this prerogative; but he himself must be careful that he acts in such matters in obedience to his instructions from her Majesty's government. For example: upon the breaking out of hostilities between Russia and Turkey, in 1877, the secretary of state for the colonies addressed a circular despatch to governors, with rules for the guidance of colonies in the observance of neutrality towards the belligerent powers.^e In 1878 various orders in council passed under 'The Foreign Deserters' Act, 1852,' were

^c Com. Pap. 1878, v. 56, p. 629.

^e Queensland Leg. Coun. Jour.

^d *Ib.* 1882, v. 46, p. 255; and see 1877, pp. 331, 353.
Rusden, Hist. N. Zeal. v. 3, p. 406.

transmitted to the governors of colonies, for their guidance in the event of applications being made by commanders of foreign merchant ships for assistance in the apprehension of deserters from the same.^f

Not long after the satisfactory conclusion of the controversy between Sir Bartle Frere and his ministers, another difficulty presented itself between the governor and the secretary of state.

Sir B.
Frere and
the Kaffir
war.

The Kaffir war had assumed larger dimensions. Other warlike tribes had engaged therein, and Governor Frere had, of his own accord, assumed the responsibility of measures which precipitated a conflict with the Zulu tribes on the northern frontier of South Africa.

Great loss of life and a frightful expenditure of public money had been incurred in this war, and the prospect of a speedy and successful termination of it appeared to be remote and uncertain.

At this juncture the attention of the Imperial parliament was aroused to the perils of the situation. Votes of censure upon Sir Bartle Frere, and upon the government who were responsible for his continuance in office, were proposed in both houses, and though they were negatived—in the House of Lords by an overwhelming majority, and in the House of Commons by a majority less than that which the administration generally commanded—yet ministers were obliged to admit that Sir Bartle Frere had taken upon himself a responsibility in excess of, if not contrary to, his instructions, in virtually declaring war against the Zulu king without the previous consent of the Imperial government.^g

^f Queensland Leg. Coun. Jour. 1878, p. 213. This point is more fully stated in *ante*, p. 228 *n*. In regard to Foreign Enlistment acts of 1819 and 1870, see Stephen's Hist. of Crim. Law of England, v. 3, pp. 259-262. The *Atalaya* was ar-

rested at Quebec under this law, by direct act of the governor-general, without intervention on part of dominion authorities. Hans. D. v. 276, pp. 1902, 1946.

^g Hans. D. v. 244, pp. 1606, 1865.

Sir B.
Frere and
South
African
war.

Under these circumstances her Majesty's government, whilst fully appreciating the great experience, ability, and energy which had been displayed by Sir Bartle Frere in the execution of the extensive powers entrusted to him as her Majesty's high commissioner in South Africa, were constrained to express their regret at his failure to secure the previous sanction and authority of the Imperial government to his proceedings—a course which they deemed to be peculiarly incumbent upon him, in view of the extraordinary difficulties which had unexpectedly presented themselves in the prosecution of the war. Without desiring, in the existing crisis of affairs, to withdraw the confidence hitherto reposed in Governor Frere—a confidence which heretofore, as a general rule, had been amply justified—the secretary of state was obliged to address him in terms of rebuke, and to express the desire of her Majesty's government that he should regulate his future actions in strict accordance with the instructions he had received from the Crown in relation to affairs in South Africa.^h

Appoint-
ment of
General
Wolseley.

Subsequently, in order to the more energetic conduct of the war against the Zulus, and the speedy restoration of peace upon terms approved by her Majesty's government, Lieutenant-General Sir Garnet Wolseley was sent to South Africa, with the local rank of general in command of all the forces therein, and to act as governor of Natal and the Transvaal,ⁱ with a special commission appointing him Queen's high commissioner in those colonies and in the lands adjacent, in place of

^h See Sir M. Hicks-Beach's despatches to Governor Frere, of April 4, 1878; March 19 and April 10, 1879; Com. Pap. 1878, v. 56, p. 301; *ib.* 1878-79, v. 53, pp. 216, 344.

ⁱ In Aug. 1881, upon the relinquishment of the authority of the British Crown over this territory,

the Queen was acknowledged as suzerain. The meaning of this term was explained to both houses of parliament by legal authorities, and the Law Mag. for May, 1882, contains an article by Dr. C. Stubbs on 'Suzerainty: Mediæval and Modern.'

Sir Bartle Frere, who retained his position as governor of the Cape colony and Queen's high commissioner elsewhere.^j South African war.

At a later period, however, the home government receded from the position they had assumed in regard to colonial defence in South Africa. They threw upon the local government the responsibility of maintaining order in the colony and of resisting aggression by the aid of colonial forces. Mr. Sprigg accepted this responsibility, and afterwards successfully conducted military operations against the native Basutos and the Kaffirs. But in May, 1881, his majority in the assembly having gradually diminished, and his health having become impaired, Mr. Sprigg resigned, and a new ministry was formed, of which Mr. Scanlen was premier.^k

Within the past thirty years a fundamental change has been effected in the administration of the British colonies by the withdrawal of the Imperial troops, previously scattered throughout every part of the empire, and the consequent devolution upon the self-governing colonies of the responsibility of self-defence. Colonial military defence.

This important reform originated in the report of a departmental committee consisting of Mr. Hamilton of the treasury, Mr. Godley of the war office, and Sir T. Elliot of the colonial office, which was appointed in 1859, to consider of the cost of colonial military defence. In the year previous the military expenditure in the colonies amounted to nearly four million pounds sterling, to which the colonies contributed something under 380,000*l.*, and few of the colonies had any effective militia or local force of their own.

The report of this committee ably pointed out the

^j Hans. D. v. 246, pp. 1204, 1262. ^k Sir Bartle Frere's Letter in Com. Pap. 1878-79, v. 53, p. 490; The Colonies, May 14, 1881, p. 323. *ib.* v. 54, p. 16.

Imperial
committee
on colo-
nial de-
fence.

injurious consequences entailed by this policy, in the burden which it imposed upon the Imperial treasury, and in its hindering the development in the colonies of a proper spirit of self-reliance, and a willingness to share in the responsibility of maintaining intact their free institutions and their national existence.¹

But the departmental committee were unable to agree upon any definite conclusions on this question. Accordingly, in 1861, upon the motion of Mr. Arthur Mills, the House of Commons appointed a select committee of their own, to inquire and report whether any and what alterations might be advantageously adopted in regard to the defence of the British dependencies, and the proportions of cost of such defence as now defrayed from Imperial and colonial funds respectively. The government gave a reluctant consent to the appointment of this committee, which, after taking voluminous evidence, reported before the close of the session.^m

Their report, likewise, was not conclusive. In fact, the labours of the committee were aptly characterised as being chiefly valuable in furnishing information, promoting discussion, and exhibiting the discordance and inconsistency of opinion on the subject, rather than as advising any practicable policy.ⁿ

Military
defence of
the colo-
nies.

The House of Commons, however, on March 4, 1862, upon motion of Mr. Arthur Mills, resolved, without a division, 'That this house (while fully recognising the claims of all portions of the British empire to Imperial aid in their protection against perils arising from the consequences of Imperial policy) is of opinion that colonies exercising the rights of self-government ought to undertake the main responsibility of providing for

¹ Com. Pap. 1860, v. 41, p. 573.
Adderley's Col. Policy, p. 380.

ⁿ See Todd, Parl. Govt. v. 1, p. 275, new ed. p. 435.

^m Com. Pap. 1861, v. 13, p. 69.

their own internal order and security, and ought to assist in their own external defence.' Colonial defence.

By circular despatches sent to the governors of colonies in 1878, 1880, and 1881, it was intimated that it will be no longer possible to provide out of Imperial army funds for the regimental pay of officers holding appointments on the personal staff of colonial governors; such pay being properly left to the colonies to provide, at their discretion.^o

Thenceforward, the principle embodied in the foregoing resolution was adopted by every successive administration as the settled policy of the empire.^p It has been generally agreed that a steady endeavour to throw more and more upon the colonies the obligation of defending themselves was a policy which parliament would support and the nation approve, and one, moreover, that would eventually be accepted as the best both for the colonies and for the mother country.

Accordingly, in debates upon this subject which arose in parliament annually from 1867 to 1870, ministers were in a position to state that the troops were being gradually withdrawn from all the leading colonies in North America, Australia, and elsewhere, until, in 1873, the under-secretary of the colonies was able to announce 'that the military expenditure for the colonies was now almost entirely for Imperial purposes,'^q and even on this account the expenditure out of Imperial funds has since been gradually diminishing. Now undertaken by themselves.

From October 1877 to October 1881, the Cape colony had incurred and defrayed from its own resources an expenditure, on account of war and rebellion, of about four millions sterling, exclusive of its ordinary military expenditure, which amounted to about

^o N. Zealand House Jour. 1882, App. A. 1, p. 5; A. 2, p. 1.

^p Adderley, Col. Policy, pp. 36, 40, 388. See a protest from the N. Zealand Government against this policy, and the Imperial reply

thereto. N. Zealand House of Rep. Jour. 1870, App. A. 1, p. 85; *ib.* A. 1 a, pp. 31, 38. And see Rusden, Hist. of N. Zealand, v. 2, pp. 571, 593, 599.

^q Hans. D. v. 214, p. 1531.

Colonial
defence.

another million. Since June 1878, it is alleged that the Cape colony has cost England nothing for either military or civil administration,^r and Imperial troops are now retained only at Cape Town.

In 1881, members of the volunteer force in South Australia volunteered aid to the Imperial troops engaged in upholding British supremacy in South Africa.^s New South Wales in 1885 despatched and maintained a contingent of her artillery and infantry forces for service with her Majesty's regular army in Egypt.^t

The fears entertained by many that the withdrawal of the British regiments would operate disastrously in the colonies, by engendering a spirit of discontent and disaffection, have not been realised. Throughout the colonies generally, much has been done for the organisation and training of local military forces and for efficient protection from foreign aggression. More than this, both in Canada and in Australia a spirit of loyalty and of patriotism has increased rather than diminished since the necessity for local self-defence has been imposed on these flourishing communities. Canada, for example, has successfully repelled attacks of lawless Fenians from the adjacent states, and in 1885 repressed the rebellion in the north-west territories; and when it became needful for Great Britain to put forth her strength in the war with Russia in 1854-55, and in the Eastern war in 1878, voluntary offers were sent from Canada and from Australia to raise and equip regiments for Imperial service.^u

S.A. war.

Canadian
royal mili-
tary col-
lege.

A royal military college has been established in Canada, for the purpose of securing such a complete military and scientific education to young men belonging to the country as would qualify them to fill all the higher positions in the Canadian military service. The training and general branches of education taught at this institution are admirably suited to qualify graduates to fill other posi-

^r Mr. J. G. Sprigg's letter to the Times, Sept. 22, 1881; see Cape Statutes, No. 1, of 1881.

^s The Colonies, April 23, 1881, p. 278.

^t N. S. Wales Act, 48 Vic. No. 28.

^u See Canada Sess. Pap. 1871, No. 7; and No. 12, p. 41. Dom. Gaz. 1877-78, p. 1289.

tions in the public service, when military service is not required.^v So well satisfied are the Imperial authorities with this institution that they have placed four commissions annually in the British army to its graduates.

The Canadian government has also established three permanent royal schools of instruction of artillery, one of cavalry, one of mounted infantry, and four of infantry, at which it is necessary for militia officers to attend in order that they may obtain certificates of qualification to enable them to hold commissions in the militia force of the country.

On the other hand, whilst giving effect to this altered policy in respect to the military defence of the colonies, her Majesty's government were not unmindful of their duty to aid the colonies in assuming this new responsibility of organising such military and naval forces as might be adequate for their protection and defence. The barracks and fortifications vacated by the Imperial troops, together with the landed property of the war department attached to them, and the arms and munitions of war in actual use, were handed over to the colonial authorities; but with this condition, that, if at any future period troops should be sent to the colony at their request or in furtherance of colonial interests, suitable accommodation should be provided for them, to the satisfaction of her Majesty's government. This condition was accepted, and the transfer was made accordingly.^w

Imperial aid to-
wards co-
lonial de-
fence.

Furthermore, the Imperial government have been sedulous to secure the efficient defence of all the British colonies from external attack. Eminent engineer officers have been employed by the war office on this special service, in different parts of the empire.

In 1863, Colonel (afterwards Lieutenant-General Sir) W. F. D. Jervois was sent to Canada, New Brunswick,

^v See official standing orders for regulation and government of college, issued in July, 1879. See also Dominion Ann. Register, 1879, p. 333.

^w Canada Sess. Pap. 1871, No. 46.

Nova Scotia, and Bermuda, to report on the state of the defences of those colonies; and again in the following year to confer with the Canadian government on that subject. His proposals were approved by the Imperial and colonial governments, and have since been partially carried out.^x

Defence
of Canada.

In 1865, at the invitation of her Majesty's government, a deputation of four Canadian ministers proceeded to England to confer with the Imperial government on the subject of the defence of Canada. Certain conclusions were arrived at; but it was agreed to defer any action thereupon until the settlement of the then pending question of the confederation of British North America, when it would become the duty of the government and parliament of the new dominion to make adequate provision for the defence of the country.^y

Austra-
lian de-
fence.

In 1875 the governments of New South Wales, South Australia, Victoria, and Queensland applied to the Imperial government for professional advice and assistance in military engineering, for the purpose of their common security, in the event of war between Great Britain and any foreign power. Whereupon, in February, 1877, Sir W. F. D. Jervois and Lieutenant-Colonel Scratchley were authorised to examine the existing fortifications, ports, harbours, and coast defences in the several Australian colonies, with instructions to consult with the local governments as to the most practicable means of putting the same into a state of efficiency. This service was ably fulfilled, and in each colony it became the duty of the local government to recommend to the local parliament the necessary appropriations for the purchase of war-vessels, the erection of fortifications, the improvement and defence

^x C. O. List, 1891, p. 436.

^y Canada Leg. Assem. Jour. Aug. 9, 1865; *ib.* 1867-68, Sess.

Pap. No. 63. For the steps subsequently taken in this direction, see *ante*, p. 377.

of harbours, or otherwise, as the case may be, pursuant to the recommendations of these distinguished and experienced officers.^a

Australian
defence.

In New South Wales, in 1881, a royal commission was appointed to consider of the matter of military defence, which made an elaborate report upon the whole subject, including the proposed general disposition of the naval defending forces around Australia.^a Since that date, further measures have been taken in the several Australian colonies to improve their system of military and naval defence, to render their volunteer forces more efficient, and generally to organise their local military forces. A memorandum on this subject, prepared by Colonel Scratchley, R.E., inspecting officer, and approved by Sir Wm. Jervois, was laid before the parliament of Tasmania in August, 1882.^b [It was shortly followed by a report of a royal commission on the local forces of Tasmania.^c] In the same session a bill for the execution of certain works for the defence of the colony was passed by the Tasmanian legislature.^d

In Queensland, during the progress of this military investigation, the legislative council addressed the governor, expressing their desire that the government should enter into negotiations with the sister colonies above mentioned, with a view to their agreement in some plan for federal defence.^e

^a See South Australia Parl. Proc. 1877, v. 1, p. 2, and App. No. 240. New South Wales Leg. Assem. Votes, &c. 1877-78, v. 3, p. 295. Vic. Parl. Pap. v. 1877-78, v. 3, No. 73; *ib.* 1878, v. 3, Nos. 77 and 81. Tasmania Leg. Coun. Pap. 1879, No. 72.

^b See N. S. Wales Leg. Coun. Jour. 1881, v. 1, p. 781; also S. Australia Parl. Proc. 1881, App. No. 181.

^c Tasmania Leg. Coun. Pap. 1882, No. 64.

^d *Ib.* No. 86.

^e Acts 1882, No. 25. See Memo. of Sir W. Jervois respecting provision of war vessels for defence of S. Australia. S. Australia Parl. Proc. 1882, App. 30. See official report on reorganisation of volunteer force in N. Zealand, presented in 1882, N. Zealand Parl. Pap. 1882, H. 10; also reports and suggestions relative to defences of Victoria, Vict. Parl. Pap. 1882-83, No. 34.

^f Queensland Leg. Coun. Jour. 1877, p. 43.

Colonial
defence.

The intercolonial conference held at Sydney, in January, 1882, discussed the question of military and naval defences, but could only agree in undertaking to urge on the local governments to fortify and defend the seaports in Australia, leaving to the Imperial government the naval defence of these colonies.^f

Defence
in New
Zealand.

In October, 1877, Sir William F. D. Jervois (who, in addition to his duties in connection with the special engineering service above mentioned, had been appointed governor of South Australia) intimated to the governor of New Zealand (the Marquis of Normanby) his purpose of visiting that colony, upon a tour of inspection of the coasts and harbours thereof, pursuant to the desire expressed by the preceding administration. To assist him in this undertaking, Sir W. Jervois requested that a government steamer might be placed at his disposal.

Lord Normanby referred this request to Sir George Grey, the premier of New Zealand, in order to ascertain the answer which ministers desired should be given to it. Whereupon, his excellency was informed that the government steamer was required for other purposes, and could not be spared. This 'curt answer' was afterwards explained to mean that, in the present state of the colonial finances, ministers deemed it to be inexpedient to incur the expense attending the proposed examination of the harbours, and preferred that the inspection should be postponed. The governor consented to convey this conclusion to Sir W. Jervois, but expressed his deep regret that his ministers should have acted, in a matter of public importance, in a manner so 'little calculated to raise the credit of the colony abroad.' He also requested that the correspondence between himself and the premier, on this subject, should be communicated to parliament without delay; a request which was immediately complied with.^g

On December 5, following, a motion was made in the legislative council that it is desirable that the council should be informed what are the duties for which the government steamer would be required, so as to render it impossible to place it at the disposal of Sir William Jervois, for the proposed examination of the colonial harbours. In amendment, it was proposed to add words expressing regret that the present government has declined to give effect to the arrangement made by the governor, on the advice of the preceding administration, to obtain a report on the defence of the colony from Sir W. Jervois. Both motions, however, were by leave withdrawn.^h

No action was taken by the house of representatives upon the

^f See *ante*, p. 261.

^h N. Zealand Leg. Coun. Jour.

^g N. Zealand House of Rep. 1877, p. 234.
Jour. 1877, App. v. 1, A. 6.

governor's message. But, on December 10, the governor wrote to the secretary of state for the colonies, inclosing the correspondence with his ministers, and justifying his own action by expressing a wish that Sir W. Jervois's visit should be postponed indefinitely, rather than that his work should not be facilitated, and due consideration manifested towards him. This course was approved by the colonial secretary.ⁱ

Colonial
defence.

However, in May, 1878, in view of the menacing aspect of affairs in Europe, the New Zealand ministers applied to the home government for a suitable armament for the defence of the principal harbours of the island, to be supplied at the expense of the colony, the total cost of which was estimated at forty-four thousand pounds.^j

In 1885 the imminence of war with Russia gave a spur to the volunteer and defence forces in New Zealand. Thirty-seven additional corps were added to the strength of the colony in that year. Besides this force there is the nucleus of a permanent militia. Batteries have been erected and submarine mining stations constructed along the coast and harbours. The total expenditure in harbour defences to March, 1889, amounted to the large sum of 442,000*l*.^k

In furtherance of a desire expressed at the colonial conference held in London in 1887, that an Imperial officer of high standing should be appointed to advise the Australian governments as to a uniform organisation of their local forces, with the object of joint co-operation in case of necessity, Major-General Edwards, R.E., C.B., was sent by the Imperial authorities in 1889 to inspect and report upon the forces and defences of these colonies.^l

Major-General Edwards, after having reported in detail to each of the governments respectively on the condition of their military forces and means of defence, as he found them, pointing out their defects, and suggesting remedies necessary for their removal, dealt, in an attached memorandum, with general questions

General
Edwards'
scheme.

ⁱ N. Zealand Off. Gaz. 1878, p. 912.

^k Australian Handbook, 1890, p. 449.

^j N. Zealand Jour. July 26, 1878, App. thereto, v. 1, A. 3. And see N. Zealand Parl. Deb. v. 30, p. 843.

^l For Gen. Edwards's Report on Australian Military Forces, see Com. Pap. 1890, v. 49, p. 85.

Australian
defence.

General
Edwards'
report.

affecting the military system of Australia as a whole. Opposed to the prevailing method of purely local administration and defence, he advocated a uniform system of military organisation throughout, so that the troops of the different colonies might act as a united force in the field, and so be in readiness to repel invasion at any given point. After dealing exhaustively with the subject, he summarised his proposals as follows:—

1. Federation of the forces.
2. An officer of the rank of lieutenant-general to be appointed, to advise and inspect in peace and command in war.
3. A uniform system of organisation and armament, and a common defence act.
4. Amalgamation of the permanent forces into a 'fortress corps.'
5. A federal military college for the education of the officers.
6. The extension of the rifle clubs.
7. A uniform gauge for the railways.
8. A federal small-arm manufactory, gun wharf, and ordnance stores.

In urging the necessity of a federal military college, the general pays a tribute to the Canadian royal military college. He says:—

'Nothing is more necessary for the efficiency of an army than the proper education of its officers, but at present no means exist in Australia to meet this important want. Canada was formerly in the same difficulty before she was federated, and it was only overcome by the establishment of the royal military college at Kingston. Having had personal experience of the officers educated there, I can testify to the excellence of their instruction. In addition to the primary object of the college, the course affords a thoroughly practical, scientific, and sound training in all branches essential to a high and general modern education. The tendency of it has been to cause the students to feel a greater pride in their country, and to

look at it from the broad standpoint of Canadians, whose aspirations are not circumscribed by the limits of a municipality. A college such as this would be eminently adapted for the education of the officers of the Australian forces.' ^m

In connection with the new Imperial policy which requires the colonies of Great Britain to share in the responsibility of their own defence, an act was passed by the Imperial parliament in 1865, 'to enable the several colonial possessions of her Majesty the Queen to make better provision for naval defence, and to that end to provide and man vessels of war, and also to raise a volunteer force to form part of the royal naval reserve, established under the act of parliament of 1859 (22 & 23 Vic. c. 40), and accordingly to be available for general service in the royal navy in emergency.' ⁿ

Naval defence of the colonies.

This act empowers the colonial legislatures to provide, at their own cost, vessels of war, weapons, seamen, and volunteers, for their own defence; and permits the colonies to place at the disposal of the Crown ships of war and seamen for Imperial service.

The whole cost of such defensive operations to be undertaken by the colonies, but the proposed arrangements to be made by them in connection with the home government by means of orders in council.

And herein it should be observed, that by a circular despatch from the colonial office, of December 3, 1880, the great importance of securing uniformity of armaments in the Imperial and colonial services is impressed upon all self-governing colonies, and their co-operation therein with the mother country is invited. The suggestion emanated from the royal commission on the defence of British possessions abroad.^o

^m Com. Pap. 1890, v. 49, p. 108. p. 114.

For opinion of the colonial defence committee on suggestions contained in Gen. Edwards's Report, see *ib.*

ⁿ 28 Vic. c. 14.

^o N. Zealand House Jour. 1881, App. A. 2, p. 19.

Naval
defence in
Australia.

The colonies of New South Wales, Queensland, South Australia, and Victoria appropriate considerable sums of money for the purchase, maintenance, and equipment of ships and munitions of war, and also for the formation of volunteer naval brigades; but, as yet, very little has been done in the colonies generally to carry out the objects contemplated by the colonial naval defence act.^p

By the Imperial defence act, 51 & 52 Vic. c. 32, a compact was made between the Imperial and Australasian governments to maintain, equip, and man five cruisers and two torpedo gunboats, at joint expense, to protect the floating trade in the Australian waters, and provide defence of certain ports and coaling stations. Of these vessels, three cruisers and one gunboat are to be kept continually in commission, the remainder to be held in reserve, irrespective of the usual strength of her Majesty's naval force employed at the Australian station. The act stipulates that these sea-going ships shall be furnished by the Imperial government, the colonies to pay 5 per cent. interest annually on the prime cost, which sum is not to exceed 35,000*l.* in a year. The colonies in addition bearing the actual charges of their maintenance, including retired pay to officers and pensions to men, providing that the annual cost does not exceed 91,000*l.* The ships to be under the sole control and orders of the naval commander-in-chief on the Australasian station, but to be retained within the limits of that station, and only otherwise employed by consent of the colonial governments. The agreement to become binding between the governments so soon as the colonial legis-

^p See Lord Norton's paper in the Nineteenth Cent. v. 6, p. 177. And the instructive paper on a Colonial Naval Volunteer Force, read by Thomas Brassey, Esq., M.P., (now Lord

Brassey) before the Royal Colonial Institute on June 7, 1878. See also Payne on the Colonies, in the English Citizen Series, 1883.

latures shall have passed special appropriations for the fulfilment of its conditions.

Naval
defence in
Australia.

Besides this joint naval equipment, the following Australian colonies possess a naval contingent of their own, viz. :—

VICTORIA.

<i>Cerberus</i>	.	.	Armour-plated twin-screw.
<i>Victoria</i>	.	.	Twin-screw steel gunboat.
<i>Albert</i>	.	.	" " " "
<i>Nelson</i>	.	.	Wooden frigate screw.
<i>Batman</i>	.	.	Twin-screw harbour trust dredge.
<i>Fawkner</i>	.	.	" " " "
<i>Gannet</i>	.	.	Tugboat.
<i>Lady Loch</i>	.	.	Customs steamer.

Torpedo boats :

Childers : *Nepean* : *Lonsdale* : *Commissioner* : *Customs* : *Gordon*.

QUEENSLAND.

Steel twin-screws :

Gayundah : *Paluma* : *Otter*.

Torpedo boats :

Midge : *Mosquito* :

NEW SOUTH WALES.

Wolverene .. Wooden steam corvette.

Torpedo boats :

Acheron : *Avernus*.

SOUTH AUSTRALIA.

Protector . . Twin-screw steel cruiser.^a

The Canadian government possesses a small fleet of armed cruisers for service in the Gulf of St. Lawrence and the great lakes, for the protection of the dominion fisheries against encroachments by unlawful depredators; also for lighthouse service. Besides this effective

In
Canada.

^a Navy List, 1892; Year Book of Australia, 1892, p. 716.

Canadian
defence.

force there is a very large number of seafaring men—estimated at over sixty-three thousand—employed in the fisheries proper, in addition to an untold number of shore fishermen, that would, if enrolled in the naval reserve of the empire, contribute greatly to the national strength. But hitherto no practical measures have been taken to organise this valuable material and to train it for effective service, as contemplated by the Imperial act of 1859.[†]

The Canadian fleet for the protection of the fisheries is composed of the following armed cruisers :—

Screw steamers :

Arcadia : Constance : Curlew : La Canadienne : Petrel : and Stanley.

Sailing schooners :

Kingfisher and Vigilant.

The colonial defence committee of the Imperial war office advised the purchase by the dominion government of heavy artillery, to be mounted on defensive works at the principal Atlantic seaports. And the general officer in command of the Canadian militia (Sir E. Selby Smyth) in 1879, in his fifth annual report to the minister of militia, urged upon the government of Canada the expediency of passing an act through the dominion parliament, in pursuance of the provisions of the colonial naval defence act above mentioned. He also recommended the purchase of the armament suggested by the colonial defence committee—remarking that the Imperial authorities had already contributed liberally to the defence of the Pacific coast of British Columbia ; and that, if the dominion government would

[†] Canada Statistical Year Book, compiled by S. C. D. Roper, 1890, p. 370. See the important suggestions in Mr. Brassey's paper, referred to

in the previous note, and in the discussion which ensued upon it. Proceedings Royal Col. Inst. v. 9, pp. 355-385.

complete the work on the Atlantic seaboard, 'the gates of Canada, from both the Atlantic and Pacific oceans, would be pretty well locked and bolted.'^s In the same report, this officer recapitulates various suggestions—for the permanent organisation of the Canadian militia force, and in regard to works of defence—which he had made in previous years, with a view to solicit 'the grave consideration of what is due to that state of military preparation which the teaching of history proves to be incumbent upon all nations.'^t

On September 8, 1879, a royal commission was appointed to inquire into the condition and sufficiency of the means, both naval and military, provided for the defence of the more important sea-ports within our colonial possessions and their dependencies, and as to the stations which might be required in our colonies for refitting or repairing the ships of the navy, and protecting our commerce. But the results of inquiry by this commission were not submitted to parliament.

Royal
commis-
sion on
colonial
defence.

In 1888 a committee was appointed by the secretary of state for war to consider proposals for the fortification and armament of the military ports of Malta and Gibraltar and likewise the home mercantile ports. Attention is drawn in the report to the relative importance and approximate cost of the works and armaments necessary to the proper defence of these stations.^u

^s See his report, Canada Sess. Pap. 1879, No. 5, p. 23.

^t *Ib.* p. 17. See also valuable papers, by Capt. J. C. R. Colomb, read before the Royal Colonial Institute, in 1873, on Colonial Defence; in 1877, on Imperial and Colonial Responsibilities in War; and in 1882, by Mr. G. S. Baden-Powell, on Imperial Defence of the whole Empire. Likewise an elaborate

paper, reviewing the naval and military resources of the colonies, read before the Royal United Service Institution by Capt. J. C. R. Colomb, in March and April, 1879, and the discussion thereon, by eminent naval and military officers, in the journal of the institution, v. 23, pp. 413-479.

^u Com. Pap. 1888, v. 25, p. 45.

CHAPTER XIII.

IMPERIAL DOMINION EXERCISABLE OVER SELF-GOVERNING
COLONIES: BY THE SUPREMACY OF THE CROWN, AND OF
THE CIVIL POWER IN ECCLESIASTICAL MATTERS.

Royal su-
premacy
in Eng-
land.

In England, the supreme human authority, under Christ, in all jurisdiction which is of a coercive character, whether spiritual or temporal, over all persons and in all causes, ecclesiastical as well as civil, is vested in the sovereign.^a

The canons framed by the established church, in her convocation and synods, have no obligatory force until they receive the assent of the sovereign, by whose public authority, as soon as they are confirmed and ratified by parliament, they become law, and are binding upon the subject. And not only are all laws in England which have any exactive and coercive authority, whether civil or ecclesiastical, acknowledged by the most eminent theologians to be the laws of the sovereign; but all courts wherein the law is administered, whether ecclesiastical or civil, are strictly speaking courts of the Crown. This is declared by the statute 1 Edward VI. c. 1, and is fully set forth in Bishop Sanderson's 'Episcopacy not prejudicial to Royal Power.'^b

^a Church of England Articles, No. 37; Canons, Nos. 1, 2, and 36. Montagu Burrows, *Parliament and the Church of England*, 1875. Gladstone on the *Royal Supremacy*, 3rd ed. 1877. Elliot, *The State and*

the Church, 1882. *Rept. of Ecclesiastical Courts Com.* 1883.

^b Printed in London, 1673, p. 47. And see a paper on *Ecclesiastical Courts*, in *Law Mag.* 4th S. v. 6, p. 248.

The royal prerogative in relation to the established church in England is subject, however, to the control of parliament. Nothing can be done by the sovereign, either with or without the consent of the clergy, to alter the jurisdiction or internal government of the established church, except by the sanction and co-operation of parliament.^c

Parliamentary control in ecclesiastical matters.

And it is the duty of parliament to see that the laws for the settlement and discipline of the national church are duly enforced; and to protect the church from innovations within its pale, as well as from injuries without. But, hitherto, parliament has refrained from any intrusion into doctrinal matters, which are obviously beyond the province of the legislature to discuss or determine.^d

The rule of constitutional law which requires that the prerogative of the Crown, in matters ecclesiastical, shall be exercised within the limits prescribed by parliament applies with equal force to any action of the Crown in relation to the national church in the colonies.

But, in conformity with the principle of religious equality which is now recognised as governing all public acts of the Crown and parliament which affect the colonies of Great Britain, the Church of England cannot be regarded as an 'established' church in any British colony. It can claim no superiority, in the eye of the law, over other religious denominations; but, equally with them, must be considered as a voluntary association, possessing such coercive authority only over its members as may be expressly conferred by legislative enactment, or obtained by common agreement with them or with any of them who are placed in ministerial office.

^c See Todd, *Parl. Govt. in England*, v. 1, p. 305, new ed. p. 502. and the *Church of England*, pp. 97, 101, 129. Lord North, *Parl. Hist.*

^d See M. Burrows on *Parliament* v. 17, p. 272.

Clergy reserves in Canada.

Formerly, a different relation existed between church and state in the British colonies. In Canada, by the Imperial act 31 Geo. III. c. 31, passed in 1791, the Church of England was partially established, and the 'Protestant clergy' thereof partially endowed, by grants of land reserved for their support.

But this gave rise to much strife and controversy. Presbyterians and other non-episcopal communions claimed equal rights, both civil and religious, in the British colonies; and this claim could not be withstood or gainsaid. In 1840 the judges of England gave a unanimous opinion to the House of Lords 'that the words "a Protestant clergy," in the statute 31 Geo. III. c. 31, are large enough to include, and that they do include, other clergy than those of the Church of England.'^e

This opinion of the judges was followed by the Imperial statute 3 & 4 Vic. c. 78, to provide for the sale of the clergy reserves in Canada, and the distribution of the proceeds thereof; and, in 1853, by another act (the 16 Vic. c. 21), which empowered the Canadian legislature to alter the appropriation of the clergy reserves under the act aforesaid, and to make such other provisions as might seem meet; provided only that the life-interests of existing incumbents should be respected.

The church disestablished and disendowed in the colonies.

Accordingly, in the following year, the legislature of Canada passed an act (the 18 Vic. c. 2) which, after making provision for the payment of the annual stipends and allowances hitherto charged on the clergy reserves, during the lives or incumbency of the existing recipients, enacted that the unappropriated balance should be divided among the several municipalities throughout the province, according to population. This was avowedly done in order 'to remove all sem-

^e Mir. of Par. May 4, 1840.

blance of connection between church and state' in Canada.^f For the recognition of legal equality among all religious denominations is an admitted principle of colonial legislation. Religious equality in the colonies.

The same principle of disestablishment and disendowment was afterwards enforced in other British colonies.

Consequent upon the decision of the privy council, in March 1865, in the case of Dr. Colenso, first bishop of Natal, in South Africa, which declared that the sovereign had no power to issue letters patent, professing to create episcopal sees, or to confer diocesan jurisdiction or coercive legal authority in colonies that were in possession of legislative institutions, the Imperial government determined to issue no more letters patent of this description.^g Colenso case.

Upon the death of Bishop Colenso, in 1883, it was claimed on behalf of the diocese of Natal that this was the only diocese in South Africa which continued in vital organic connection with the Church of England in the mother country; inasmuch as the other episcopal churches in South Africa have repudiated the authority of the privy council as the judicial interpreter of the standards and formularies of the mother Church of England.^h

Wherever, throughout the British dominions, it has been found practicable to carry out the principle of religious equality—by the disestablishment of any churches previously placed by law upon a footing of preference or superiority over other religious bodies,

^f 18 Vic. c. 2, sec. 3. See Religious Endowments in Canada. The Clergy Reserve and Rectory Questions; a chapter of Canadian History, by Sir Francis Hincks, London, 1869. And see a paper by the Rev. Edwin Hatch, 'A free Anglican Church,' in Macmillan's Mag. v. 18, p. 449.

^g See Todd, Parl. Govt. v. 1, p. 309, new ed. p. 507; and see *post*, p. 413.

^h See The Colonies, Aug. 10, 1883, p. 16; see *post*, p. 416.

Religious
equality
in the
colonies.

and by refraining from any exercise of prerogative for the creation of ecclesiastical offices or the appointment to vacant bishoprics—this has since been done.

In 1869 and subsequent years the Imperial government notified the governors of the colonies in the West Indies, in Gibraltar, in Australia, in the Mauritius, and elsewhere, of their intention to enforce the same principle of religious equality, notwithstanding that it might not have been specially sought after in particular colonies. Thus, in Jamaica, where the majority of the population objected on principle to state endowments in aid of religion, they have been entirely withdrawn; whilst elsewhere, as in Trinidad, Barbadoes, British Guiana, the Cape, Lagos, Gibraltar, and the Mauritius, where there has been a general disposition to retain them, the government have acquiesced therein, provided that the endowment should be distributed equally amongst all denominations who were willing to receive them. This policy is now strictly adhered to; and all state connection in any colony, either with episcopal, presbyterian, or other churches, conferring upon them a preference over other denominations, has ceased.ⁱ

In 1873 the Imperial government, in accordance with their policy in regard to religious endowments, resolved to sever the connexion which heretofore existed between the Crown and chaplains at consular stations abroad, by withdrawing the allowance in aid of their support granted under the act 6 Geo. IV. c. 87. This determination met with much opposition. In 1874 a committee of the House of Commons was appointed to consider the case, and on July 9, 1875, the attention of the house was called to the report of this committee, and it was moved to resolve that the adherence of the government to this policy, in respect to consular chaplains, was uncalled-for and inexpedient, and ought to be reconsidered. But, after debate, the motion was negatived.^j

ⁱ Com. Pap. 1871, v. 48, p. 565; 501, 512. And see Hans. D. v. 220, *ib.* 1873, v. 50, p. 9, v. 48, p. 581; p. 700; v. 228, p. 767; v. 230, p. *ib.* 1874, v. 7, p. 509; *ib.* 1877, v. 1399.
61, p. 149; *ib.* 1883, v. 45, pp. 444, ^j *ib.* v. 225, p. 1250.

In 1881 the principle of withdrawing state grants from the clergy was applied to the island of Ceylon. The representatives of the old Dutch church claimed exemption from this decision, because of the terms of the treaty of capitulation, in 1796. But, after consulting the law officers of the Crown, the secretary of state concluded that the Imperial policy must prevail, and that the particular article of the treaty in question 'could not be deemed binding upon the British government for all time and in all circumstances.'^k In the same year, the Imperial government resolved to discontinue all contributions out of the public funds to the Church of England in Labuan and the Straits Settlements. But five years' grace was allowed both in this instance, and to the church in Ceylon.^l Subsequently, however, in view of the decided and unanimous expression of opinion by the legislative council at Singapore, against the withdrawal of the existing moderate endowment of the Church of England in the Straits Settlements, the Imperial government agreed not to press the matter any further.^m

Withdrawal of state aid to colonial clergy.

It now devolves upon the clergy and laity of the Anglican communion in the several British colonies, with such assistance as may be indispensable from local legislation, to make their own arrangements for securing an effective episcopal organisation of their respective churches. Synods of colonial churches, however, cannot without statutable authority assume any jurisdiction beyond that which they may exercise by the voluntary consent of their own members and of the members of the congregations in their respective communions. In order to clothe church synods with necessary corporate powers, it is customary to apply to the colonial parliaments for acts of incorporation.ⁿ

Episcopal organisation in the colonies.

Several acts incorporating the synods of the various dioceses of the Church of England in Canada have been passed by the legislatures of the Canadian provinces, before and since confederation. Before confederation an act for enabling the clergy of the Canadian dioceses of the Church of England to meet in synod was passed in 1856 (19 & 20 Vic. c. 141). After confederation, this act was

^k Com. Pap. 1881, v. 65, p. 66.

^l *Ib.* 1882, v. 46, p. 638.

^m *Ib.* p. 639.

ⁿ See Todd, Parl. Govt. in Eng v. 1, p. 313, new ed. p. 512.

extended to other dioceses, by provincial legislation.^o Similar acts have also been passed on behalf of the Presbyterians, Wesleyan Methodists, and other denominations.^p

Consecra-
tion of co-
lonial bi-
shops in
England.

While the Crown has withdrawn from any interference in the choice and appointment of colonial bishops, it is still necessary to obtain a mandate from the sovereign where it is proposed to consecrate a colonial bishop in England by bishops of the established church. This mandate, however, confers no territorial title, designation, or jurisdiction upon the bishop whose consecration it sanctions; but leaves all such questions to be disposed of by those who may voluntarily submit themselves to his jurisdiction. He may, indeed, receive from the archbishop of Canterbury a commission assigning him a sphere of action.^q But he must obtain from the local legislature all necessary powers for church organisation.

Episcopal
church in
Australia.

On Jan. 10, 1872, the bishop of Sydney (New South Wales) addressed a letter to the secretary of state for the colonies, expressing the earnest desire of the episcopal church in Australia to maintain, as far as possible, its connexion with the mother church in England. To

^o See Ontario Stat. 1868-9, p. 264, 1874, 2nd sess. p. 244. Quebec Stat. 1868, p. 112, 1871, p. 42. Extended to Nova Scotia by Can. Act 1870, c. 57, and to N. Brunswick by Can. Act 1871, c. 58. To Manitoba and N.W. territories by Manitoba Act 1876, c. 27, and to Saskatchewan by Dominion Parl. in 1882. In the previous year the bishop of Saskatchewan received corporate powers to hold real estate for ecclesiastical and educational purposes in N.W. territories by an ordinance of the Lt.-Governor in council (No. 8 of 1881). And the province of British Columbia, in the same year (stats. c. 2) incorporated the bishops of the three dioceses therein, with power to hold

and dispose of real estate. An act was passed by the Quebec legislature in 1882, on behalf of the church society of the diocese of Quebec.

^p See Ontario Stat. 1871-2, p. 369, and Ontario Act 1874, 2nd sess. p. 247; and the Quebec Act 1875, p. 212, to provide for Union of Presbyterian Churches in Canada. But these local acts were pronounced *ultra vires* of the provincial legislatures by the Privy Council (see *post*, p. 479), and similar legislation was afterwards obtained from the dominion parliament in 1882.

^q Com. Pap. 1873, v. 48, p. 907; *ib.* 1882, v. 46, p. 637.

this end he proposed that while colonial synods should continue to nominate clergy to fill vacant sees, her Majesty should be advised to grant license to the archbishop of Canterbury to consecrate, and therein to name the diocese to which the bishop should be assigned. Of late years the royal license had merely specified that 'the party is to be consecrated to be a bishop in such or such a colony, or sometimes in her Majesty's colonial possessions.' This had given rise to a difficulty respecting the succession, by an incoming bishop, to church property held by his predecessor.

Episcopal
church
in Aus-
tralia.

This letter, moreover, pointed to the need of Imperial legislation to define and regulate the status of priests and deacons ordained in the colonies.

The under-secretary of state, in reply, informed the bishop that Lord Kimberley was not prepared to recommend a departure from the course hitherto observed and approved by the law officers of the Crown, under which, in conformity with the decision of the privy council, above mentioned, her Majesty would be advised to refrain in future from appointing a bishop, in any colony possessing legislative institutions, without the sanction of the legislature. She will, however, be advised, at the request of the archbishop of Canterbury, to issue mandates to authorise episcopal consecrations, by bishops in England, without assigning any particular diocese to the new bishops. Bishops may be consecrated in the colonies without a royal mandate; and the colonial episcopate must secure their position, in respect to endowments and otherwise, by voluntary agreement, or local legislation, as may be most convenient and practicable.

In other
colonies.

Nevertheless, the urgent need of some legislation, whether local or Imperial, to determine the question of ecclesiastical property, and the right of the Anglican churches in those colonies where the matter has not

Episcopal
church
in the
colonies.

been already disposed of to retain lands and other property originally granted 'for ecclesiastical purposes in connexion with the Church of England,' in particular colonies, has been strikingly exemplified by the decision, on Aug. 25, 1880, of the supreme court of the Cape of Good Hope, in the case of 'The Bishop of Grahamstown v. Dean Williams.' This judgment declares that 'the church of the province of South Africa' is separated 'root and branch' from the mother church of England, inasmuch as, by its constitution, the colonial church has declared itself independent of the jurisdiction of the privy council (a tribunal which is practically competent to decide questions of faith and doctrine, which may arise in the established church.)^r The episcopal church in South Africa is accordingly held by the supreme court to be debarred from claiming possession of any church property which is held in trust for the Church of England in the colony.^s Meanwhile, a circular despatch was addressed by the secretary of state to the governors of colonies, to inquire into the opinion entertained as to the necessity for Imperial legislation on the subject of church property therein. The reply received from the governor of Queensland was to the effect that such Imperial legislation was not required, as the local legislature was fully able to deal with these matters, upon application from the Church of England in the colony.^t This opinion was concurred in by the other Australian colonies, by Canada, and by nearly all the colonies in possession of representative institutions.^u

As concerning the status of colonial clergy, the

^r See *post*, p. 418.

^s See London Guardian, Oct. 20, 1880, p. 1426. Literary Churchman, Oct. 15, p. 480.

^t Queensland Leg. Coun. Jour. 1874, p. 337.

^u See Corresp. on Fiduciary Pro-

perty of Colonial Bishops, Com. Pap. 1874, v. 44, p. 463. And see two letters on Legal Growth of Colonial Episcopate, by Lord Blachford, in London Guardian, Dec. 13 and 27, 1882.

government intimated that they would not object to the colonial clergy being placed on a similar footing to the clergy of the Scottish episcopal church, under the act 27 & 28 Vic. c. 94; but they were not then prepared to propose legislation on the subject.^v

Colonial
episcopal
clergy.

In 1873 Lord Blachford (formerly Sir F. Rogers, and under-secretary of state for the colonies) introduced a bill into the House of Lords to continue the ecclesiastical corporations previously established in any British colony, 'by enabling the future *elected* bishops to succeed to the endowments' of the bishops appointed under letters patent; and also to remove the legal disability of clergy ordained in the colonies from officiating or holding preferment in other parts of the empire.^w This bill passed the Lords, but was dropped in the Commons. The judgment of the supreme court of the Cape Colony was sustained, on appeal, by the judicial committee of the privy council, in June 1882.^x The legislature is the only authority competent to settle this question. Accordingly, in 1874 Lord Blachford's bill was again introduced, and became law; but with the omission of the clauses affecting the devolution of church property, which it was agreed could be more suitably dealt with by the local legislatures.^y

Imperial
church
legislation
for
the co-
lonies.

It is unlikely that the Imperial parliament will entertain any further proposals for legislation affecting ecclesiastical questions in the colonies.

The *status* of the Anglican church in the British colonies is one of ecclesiastical independence. This was the natural and inevitable outcome of the decision

^v New Zealand Parl. Pap. 1872, 404.

A. No. 1, α, p. 31. For particulars of previous action to the same effect, which proved unsuccessful, see Todd, Parl. Govt. v. 1, p. 314, new ed. p. 513; Hans. D. v. 187, pp. 256, 762; Adderley, Colonial Policy, pp. 395-

^w Hans. D. v. 216, p. 484.

^x 7 L. R. App. Cas. p. 484; L. T. Rep. N.S. v. 47, p. 51.

^y *Ib.* v. 218, p. 1804. Act 37 & 38 Vic. c. 77.

Episcopal
church
in the
colonies.

of the privy council in 1865, in the case of Bishop Colenso,^z and of the judgment of the House of Lords in 1867, in *Forbes v. Eden*.^a This case has been termed the charter of colonial church independence. It establishes and defines the powers of general synods, as being supreme in all matters over which civil courts have no jurisdiction. It is confirmed in Upper Canada by the decision in the case of *Dunnet v. Forneri*,^b which declares that the court of chancery has no jurisdiction to inquire into the regularity of the excommunication of an individual, there being no question of property or civil rights involved.

Episcopal
church
in New
Zealand.

The Bishop of Wellington, at the opening of his diocesan synod, in 1873, declared that the Church of England in New Zealand—or, as it is now designated, the Church of the Ecclesiastical Province of New Zealand—‘is a branch of the Catholic church, independent of all control from any other branch of the church whatever. No other church has any right to legislate for it. No appeal from its decisions can be carried to the courts of any other church. It is in the same relation to the Church of England as the church of Ireland or the church of America.’ It is, in fact, entirely autonomous and free, subject neither to the authority of church or state in the mother country, or even to the decisions of the judicial committee of the privy council; save only to the extent, presently to be considered, to which even nonconformist congregations in all parts of the empire are amenable to that tribunal. The free constitution framed in 1859 for its own governance, under the authority of a local statute, by the episcopal church in New Zealand, in communion with the mother church in England—as since amended—was afterwards

^z See *ante*, p. 409.

^a L. R. Scot. App. v. 1, p. 568.

^b 25 Grant Ch. Cas. 199.

copied by other episcopal churches in Australia, and will doubtless form a model for all the churches of the Anglican confession throughout the colonies.^c

Episcopal church in the colonies.

The Australian, the New Zealand, the Canadian, and the South African episcopal churches now each possess a distinct and complete organisation. Deriving their mission directly from the Church of England, they stand to that communion in the relation of daughters, but claim for themselves an independent and a self-reliant position. They have still to agree upon some common spiritual tribunal, to which questions may be carried on appeal from the colonial church.^d

Inasmuch as it is the undoubted prerogative of the Crown to entertain appeals in all colonial causes, any ecclesiastical matters in dispute in any colony, which, prior to the Act 25 Henry VIII. c. 19, would have been referred to the pope—and any doctrinal matter upon which judgment had been pronounced by a colonial law court—is capable of being adjudicated upon by the judicial committee of the privy council, in the shape of an appeal from the decision of the inferior court. But such an appeal ‘must come as a civil question, raised on a point of fact, brought from the civil courts in the colonies’ to the supreme legal tribunal in the mother country.^e And the judicial committee of the privy council expressly disclaim having any ‘jurisdiction or authority to decide matters of faith or to determine what ought in any particular to be the doctrine

Ecclesiastical questions before the privy council.

^c For particulars of which see the Cont. Rev. v. 40, p. 446; Com. Pap. 1882, v. 46, p. 655. Tucker's Life of Bishop Selwyn, of New Zealand and Lichfield, v. 2, c. 3. ‘Ecclesiastical Organisation;’ Phillimore, Ecclesiastical Law, v. 2, part 10, c. 3; ‘The Church in the Colonies,’ p. 2230.

^d See Bishop of Tasmania's letter in the London Guardian

of Oct. 5, 1881, p. 1397.

^e Hans. D. v. 186, pp. 374–382. The case of Long v. The Bishop of Cape Town was an appeal to the privy council from the supreme colonial court, Moore, P. C. Cases, N.S. v. 1, p. 411. See also the Guibord Case, Brown v. Curé, &c., de Montréal, P. C. Appeals, v. 6, pp. 157, 207.

Episcopal
church
in the
colonies.

of the Church of England. Its duty extends only to the consideration of that which is by law established to be the doctrine of the Church of England, upon the true and legal construction of her articles and formularies.^f Within this limit, the judicial committee, in deciding upon ecclesiastical questions affecting the established church claim to pronounce authoritatively upon questions of faith and doctrine, and do not admit of appeals to holy scripture in opposition either to the articles and formularies of the church or to the provisions of an act of parliament.^g

American law, as administered in the several states of the union, and by the federal courts, is equally decided in claiming complete and exclusive jurisdiction over all religious societies, upon questions of life, liberty, and property, whether real or personal estate, or money, in the hands of ecclesiastical associations. But it leaves all spiritual questions—whether of worship, doctrine, discipline, or membership—to the exclusive decision of the religious body itself; save only where it may be necessary to deal with such questions, in order to decide upon a matter of civil rights.^h

Civil
power in
ecclesiastical
cases.

No ecclesiastical body in the empire may deny the authority of the civil courts to inquire whether, in a particular case, the acts of that body have been in conformity and agreement with its own laws, or whether such acts have infringed upon some civil right or interest, recognised by those laws or by the laws of the land, and a right of appeal to the privy council, from the decisions of the local court, upon any such question, must equally exist.ⁱ

^f Brooke, Privy Coun. Judgments (1872) pp. 35, 95.

^g See article on Grahamstown Judgment and the Judicial Committee in Church Quar. Rev. 15, p. 169.

^h See Green's Am. Ed. of Brice on Ultra Vires, Br. Quar. Rev. v. 64, p. 414; Catholic Presb. v. 4, p. 260; Contemp. Rev. v. 39, p. 416.

ⁱ See *ante*, pp. 305–309. See judg-

ments of Supreme Court of British Columbia on Oct. 24, 1874, and May 18, 1875, to give effect to decision of Bishop's Court for removal from ecclesiastical office of Rector and Dean of Christ Church Cathedral, Victoria, for not conforming to discipline and government of Church of England in the Colony. Printed at Victoria, 1875.

In respect to non-established churches, the interference of the civil power is justifiable in two distinct classes of cases. Firstly, with a view to the settlement of questions affecting the exercise of civil rights in the religious body itself. Secondly, in order to prevent any encroachment, by one religious society, upon the rights of other portions of the community.^j

Jurisdiction of civil power in ecclesiastical cases.

Ecclesiastical courts with temporal jurisdiction—such as exist in the mother country—have never been introduced into the British colonies. The colonial legislatures have gradually supplied the machinery for determining the questions which in England are disposed of by such tribunals.^k

So far as temporal and civil rights are concerned, the courts of law have jurisdiction over non-established churches; and the control of the civil power, as exercised through the administration of the judicial office, may be properly invoked to decide questions arising out of the operation of rules agreed upon for the government of any religious society. The fact that some question of spiritual rights may run parallel with the civil question cannot exonerate the courts from the duty of adjudicating upon matters which may indirectly, but in supposable cases must substantially, involve the interpretation of the ecclesiastical laws of the particular community.^l

The source of the authority of the Crown in eccle-

^j Amos, Fifty Years of Eng. Const. p. 111. And see Imperial Act 34 & 35 Vic. c. 40, to regulate the proceedings and powers of the Primitive Wesleyan Methodist Society of Ireland. And see *Forbes v. Eden*, 1 House of Lords Cases (Scotch Appeals), 568; *J. Johnston v. The Minister and Trustees of St. Andrew's Church*, Montreal, 1 Supreme Court of Canada Rep. 235; *Deeks v. Davidson*, Grant Chancery Rep.

(Ontario), v. 26, p. 488.

^k Stokes, Const. of Colonies, p. 204; Am. Southern Law Rev. N.S. v. 7, p. 629.

^l Elliot, State and Church, p. 163; Innes, Law of Creeds in Scotland. And see Mr. Gladstone on the Functions of Laymen in the Church, reprinted in his 'Gleanings of Past Years,' v. 6, p. 1; Law T. v. 70, p. 75; Grant, Ont. Ch. Rep. v. 25, p. 199.

Royal supremacy.

ecclesiastical matters, and of its jurisdiction in the last resort over all ecclesiastical causes that may come before any civil court within the realm, is to be found in the doctrine of the royal supremacy. This doctrine is a foundation principle of the English constitution. Appeals to Rome were originally an usurpation of the constitutional rights of the Crown. They were forbidden before the reign of William the Conqueror, and were not allowed by that sovereign. But notwithstanding statutory prohibitions they began to be made in the reign of Stephen, and became increasingly prevalent until the era of the reformation, when, by the act 24 Henry VIII. c. 12, the king's supremacy was reasserted, and appeals to Rome forbidden under penalty of *præmunire*.^m Subsequently, this principle became interwoven with the very essence of the monarchy itself; for, by the act of settlement, the succession to the Crown of England is expressly limited to protestant members of the Church of England; while, by previous enactment, ecclesiastical supremacy had been conferred upon the Crown, as a perpetual protest against the assumption, by any foreign priest or potentate, of a right to exercise coercive power or pre-eminent jurisdiction over British subjects.ⁿ

This principle is formally enunciated in the oaths required to be taken in the various colonies of Great Britain by the governor or other chief magistrate, and the members of the legislature.^o

The statute of 1 Elizabeth c. 1, known as the act of supremacy, declares that no foreign prince, person,

^m See Taswell-Langmead in Law Mag. May 1881, p. 248.

ⁿ 12 & 13 Will III. c. 2. Bailey, Succession to the English Crown, p. 227. Elliot, The State and Church, p. 22.

^o Com. Pap. 1866, v. 50, p. 525. See despatch from secretary of state,

in 1876, in regard to complaint against the president of the Leg. Council of Queensland, for being present at a luncheon where priority was given to health of the Pope before that of the Queen. Queensland Leg. Coun. Jour. 1876, p. 1031.

prelate, or potentate, spiritual or temporal, shall henceforth use, enjoy, or exercise any power, jurisdiction, or authority within the realm, or within any part of the Queen's dominions; and that all such power or authority heretofore exercised shall be for ever united and annexed to the Imperial Crown of this realm.

Papal claims abjured in British empire.

This declaration remains in force to the present day,^p and it is the statutory warrant for the supremacy of the Crown, in all matters and causes, civil or ecclesiastical, throughout the British empire, as well as for the renunciation of the papal claims therein.

Within our own day, this principle has been reasserted by the Imperial parliament in an emphatic and unmistakable manner.

In September, 1850, the pope issued a brief, dividing the United Kingdom into dioceses, over each of which was placed an archbishop, or bishop, with territorial jurisdiction, and an ecclesiastical title, derived from some city or town in Great Britain. This proceeding excited great indignation in the country; and an act of parliament was passed, by large majorities, declaring all such briefs, and all jurisdiction pretended to be conferred thereby, unlawful and void, and prohibiting the assumption of ecclesiastical titles in respect of any places within the United Kingdom.^q The ecclesiastical titles act was in substance a declaration of the common law, which was affirmed before the reformation, and ratified by parliament some five hundred years ago. It was intended, however, as a measure of defence, not of aggression, and no attempt was ever made to enforce its prohibitions or to levy the penalties which it imposed. But it would be erroneous to infer from this, that the act was either ineffectual or unnecessary. On the contrary, it was intended to be 'a plain and emphatic assertion by the legislature of the constitutional authority and supremacy of the sovereign, and there has not since 1851 been any general or ostentatious infraction thereof by those against whom it was directed.'^r

Ecclesiastical titles act.

^p See the Revised Statutes, 1 Eliz. c. 1, secs. 16, 17. Remarks on the Royal Supremacy; as it is defined by Reason, History, and the Constitution: by Rt. Hon. W. E. Gladstone, M.P., 3rd ed. 1877, reprinted in his 'Gleanings of Past

Years,' v. 5, p. 173.

^q Act 14 & 15 Vic. c. 60. And see Martin, Life of the Pr. Consort, v. 2, p. 335.

^r Report, Committee of House of Lords, June 16, 1868; Lords Pap. 1867-68, v. 30, pp. 573, 678.

Ecclesiastical titles
act.

Repeated attempts were made in 1867, and following years to 1870, to induce parliament to repeal this statute, and in 1867 a committee of the House of Commons reported in favour of its abrogation ; but these attempts were unsuccessful.^s

At length, in 1871, parliament consented to repeal the act of 1851, which in its restrictions had been practically a dead letter, and in so far to legalise, on behalf of Roman catholics in the United Kingdom, those local and territorial arrangements for assigning to the clergy and ecclesiastical hierarchy of the Roman church therein special districts for spiritual service. It was admitted to be inexpedient 'to impose penalties upon those ministers of religion who may, as among the members of the several religious bodies to which they respectively belong, be designated by distinctions regarded as titles of office, although such designation may be connected with the name of some town or place within the realm.'^t

But it was at the same time provided that the repeal of the aforesaid act of 1851 'shall not, nor shall anything in this act contained, be deemed in any way to authorise or sanction the conferring or attempting to confer any rank, title, or precedence, authority or jurisdiction, on or over any subject of this realm, by any person or persons in or out of this realm, other than the sovereign thereof.'^u

The
Jesuits.

The Roman catholic relief act, of 1829, contained a clause similar in principle to the act of 1851, forbidding the assumption of the name, style, or title of any archbishop, bishop, or dean, in England or Ireland, by any person other than the lawfully appointed incumbent of the same ; and likewise another clause, forbidding any member of the order of Jesuits to 'come into this realm.'^v These provisions of the statute soon ceased to be ope-

^s Hans. D. v. 186, pp. 363, 706 ; v. 187, p. 564 ; v. 190, p. 992 ; v. 191, p. 239 ; v. 192, p. 1982 ; v. 194, p. 186 ; v. 196, p. 261 ; v. 197, p. 1169 ; v. 203, p. 1683.

^t Act 34 & 35 Vic. c. 53.

^u *Ibid.* In accordance with the principle above set forth, the Roman catholic bishops in Great Britain and Ireland (prior to the promulgation of the Syllabus by Pope Pius IX.) declared that they recognised their paramount obligations to the British Crown, in all civil matters. See Mr. Gladstone on the Vatican Decrees, in their bearing on civil allegiance, London, 1874. But

in the Syllabus and Encyclical Letter of Pius IX. issued on Dec. 8, 1864, as endorsed and supplemented by the decrees of the Vatican Council, in 1870, the supremacy of the church over the state, in civil as well as in spiritual matters, is asserted, and the supremacy of the pope, and his claim to the obedience of his spiritual subjects, is affirmed, as an article of faith. See Gladstone's Vatican Decrees, ed. 1875, p. 43. And his Vaticanism, an answer to Reproofs and Replies, published in February, 1875.

^v Act 10 Geo. IV. c. 7, secs. 24, 29.

relative, and are not now enforced. But, so far as the clause relating to the Jesuits is concerned, the House of Commons was assured, in 1875, that it is not looked upon by her Majesty's government as being obsolete, but, on the contrary, 'as reserved powers of law of which they will be prepared to avail themselves if necessary.'^w

Diplo-
matic re-
lations
with
Rome.

Another point of constitutional interest is deserving of mention in this connection. After the reformation, all diplomatic relations with Rome were strictly prohibited. An attempt to infringe this principle, in 1687, was characterised as treasonable by the House of Commons.^x In 1848, however, ministers favoured the introduction of a bill into parliament to enable the Queen 'to open and carry on diplomatic relations with the court of Rome.' It passed the House of Lords, but was amended in the Commons, by substituting the words 'sovereign of the Roman states' for 'the court of Rome.' With this alteration it became law (11 & 12 Vic. c. 108), being carefully worded so as to avoid all recognition of ecclesiastical pretensions, which might be deemed inconsistent with the position of England as a protestant nation, and with the ecclesiastical supremacy of the British Crown. But in 1870 the pope ceased to be 'sovereign of the Roman states,' and that title was transferred to Victor Emmanuel, king of Italy. Accordingly, the statute above mentioned was repealed, as an obsolete enactment, by the statute law revision act of 1875.^y

Upon the cession of Canada to the British Crown, while entire freedom of religion was guaranteed to the French Canadian population, the principle of the royal supremacy was distinctly maintained. By the fourth article of the treaty of 1763, his Britannic Majesty agreed to grant 'the liberty of the catholic religion

Roman
catholic
religion in
Canada.

^w Mr. Disraeli, Hans. D. v. 224, pp. 484-511.
p. 1622. And see *ib.* v. 225, p.

^x State Trials, v. 12, p. 598.

1058. For Jesuit question before the Dominion parliament see *post*,

^y Bishop of Lincoln's letter to The Times, Jan. 10, 1883.

Roman
Catholic
church in
Canada.

to the inhabitants of Canada,' and promised to 'give the most effectual orders that his new Roman catholic subjects may profess the worship of their religion, according to the rites of the Romish church, as far,' it was significantly added, 'as the laws of Great Britain permit.' The Quebec act, passed in 1774, ratified and secured to the inhabitants of that province the free exercise of their religion, pursuant to the treaty of 1763, with a proviso that the same should be 'subject to the king's supremacy, declared and established by an act made in the first year of the reign of Queen Elizabeth, over all the dominions and countries which then did, or thereafter should, belong to the Imperial Crown of this realm.'^z Moreover, in the royal instructions to the Duke of Richmond, on his appointment in 1818 as governor-in-chief in and over the provinces of Upper and Lower Canada, it is stated, with reference to the inhabitants of Lower Canada, 'that it is a toleration of the free exercise of the religion of the church of Rome only to which they are entitled, but not to the powers and privileges of it as an established church, that being a preference which belongs only to the protestant Church of England.' And 'it is our will and pleasure that all appeals to a correspondence with any foreign ecclesiastical jurisdiction, of what nature or kind soever, be absolutely forbidden under very severe penalties.'^a

Although, by subsequent legislation, as we have seen, every vestige of preference, on the part of the state, for one religious denomination over another has been abolished in Canada, so that no special powers or privileges can be claimed by any religious society, under pretence of being 'an established church,' yet

^z 14 Geo. III. c. 83, sec. 5. ^a Com. Pap. 1837-38, v. 39, No. Cavendish, Debates on Quebec Bill, 94, pp. 71, 72.
p. 216.

the absolute supremacy of the Crown, in all causes and matters ecclesiastical, as opposed to claims and pretensions of the pope of Rome to jurisdiction over British subjects, is the law in Canada, as unreservedly as in all other parts of the Queen's dominions.

Roman
Catholic
church in
Canada.

In conformity with this constitutional doctrine, the Canadian supreme court decided, in 1877, that a certain election of a member to serve in the dominion parliament was void, because some Roman catholic priests had been guilty of undue influence thereat; having, under colour of the performance of spiritual functions, interfered with the free exercise of the elective franchise, in violation of the civil rights of the electors. This timely judgment struck at the root of the ultramontane claims of the supremacy of the church over the state—claims which had been vehemently urged by some dignitaries of the church of Rome in Canada—and vindicated the true doctrine of the supremacy of the law. It was a unanimous decision of the court, which included learned judges of French origin, and of the Roman catholic faith.^b

Supreme
court on
such pre-
tensions.

Note also Judge Johnson's ruling in the Berthier election case in the Montreal court of review on November 30, 1880.^c This able judgment, whilst annulling the election because of undue clerical influence on the part of a Roman catholic priest, who acted as agent for the successful candidate, discriminates, in a fair and impartial spirit, between the lawful influence exercisable by the clergy over their people, in all matters, secular or religious, and the abuse of such privileges, by threats of excommunication, or of withholding spiritual ordinances, in order to coerce individuals in the exercise of their civil rights.^d

^b *Brassard et al. v. Langevin*, in Canada, by Charles Lindsey, Canada Supreme Court Rep. v. 1, Toronto, 1877.
^c L. C. Jurist. v. 26, p. 288.
^d Legal News, v. 4, pp. 3, 10.

p. 145. See the North Am. Rev. v. 125, p. 557, on the ultramontane movement in Canada. And Rome

Handwritten:
Langevin
Johnson

Handwritten:
3/3/84

CHAPTER XIV.

JURISDICTION EXERCISABLE OVER SUBORDINATE PROVINCES
OF THE EMPIRE BY A CENTRAL COLONIAL GOVERNMENT.

Colonial
govern-
ment.

WITHIN the past fifty years a novel principle has been introduced into the colonial polity of Great Britain, whereby the Imperial government has relinquished the direct supervision and authority over provinces which are included within the limits of larger colonies, and the responsibility of exercising a general control over such subordinate provinces has been vested in a central colonial government.

This transference of Imperial control is a natural consequence of the most ample recognition of the doctrine of local self-government. But, practically, such concession of Imperial rights to the highest local authority in the particular colony has varied according to the circumstances in which each colony is placed. In New Zealand, which is the earliest example of such a form of administration, the provinces were directly and unreservedly subordinated to the central authority. In the later instances of the Canadian and South African colonies, local rights were expressly reserved, and the principle of federation introduced, with the assignment of limited powers only to the federal government. Invariably, however, certain reservations and restrictions have been imposed upon the central authority by the wisdom of the Imperial parliament.

Since the year 1852, three jurisdictions of this de-

scription have been established by Imperial legislation—in the respective colonies of New Zealand, of Canada, and of South Africa.

But, inasmuch as the only example of subordinate provincial governments now in active operation in the empire is to be found in British North America, it may be better to depart from the strict chronological order in describing the working of these local institutions, and to consider briefly the special peculiarities of the Australasian and South African provincial systems; and then to examine in detail the questions that have arisen out of the formation of subordinate provinces in the dominion of Canada.

Federal
and pro-
vincial
jurisdic-
tions.

a. *Provincial governments in New Zealand.*

In 1851, whilst Earl Grey held the seals of office as her Majesty's secretary of state for the colonies, a scheme for the future government of New Zealand was elaborated by the Imperial government. It was proposed to grant a representative constitution to this rising colony, with a general assembly, to be composed of two legislative chambers, and to divide the colony into five (afterwards changed to nine) provinces, each of which should be governed by a superintendent with an elected provincial council: these councils to be empowered to legislate on all subjects of a local nature not directly reserved for the consideration of the general assembly; such provincial enactments to be assented to, in the first instance, by the superintendent, but to be subject to disallowance by the paramount authority of the Crown conveyed through the governor of New Zealand, in like manner as laws passed by the general assembly.

In New
Zealand.

In February, 1852, before Earl Grey's scheme had been submitted to parliament, a change of ministry

New
Zealand
govern-
ment.

occurred. Sir John Pakington, who succeeded to the office of colonial secretary, nevertheless introduced the New Zealand government bill of his predecessor into the House of Commons, but with one important alteration. He proposed that, in view of the limited powers of the provincial councils, the superintendent should have authority to assent to the laws passed therein, on behalf of the governor of the colony and subject to instructions to be received from him. And the governor was further empowered to disallow any local act so assented to, within *two years*. This provision was made in order to enable the governor, in any special case, to refer for instructions to her Majesty's secretary of state. By this means the colonial office was enabled to exercise a control over all 'provincial legislation. But, during the progress of the discussion on this bill in parliament, the government were induced to amend it, at the suggestion of Mr. Gladstone, so as practically to abandon the Imperial veto on acts passed by the provincial councils. This was effected by reducing the period within which it should be competent to the governor to disallow any such act from *two years* to *three months* after his receipt of the same.^a

When this measure came before the House of Lords, Earl Grey expressed great regret that the power of the Crown to disallow acts passed by a provincial legislature had been, for the first time, formally abandoned. Admitting that, owing to the limited powers of the provincial councils, it might have been rarely necessary to exercise the control of the Crown over their enactments, yet he was of opinion that, inasmuch as under the municipal reform act of 1835 the Crown was invested with authority to disallow corporation by-laws,

^a See Hans. D. v. 121, pp. 114, Act 15 & 16 Vic. c. 72, secs. 18-31. 923, 962, 978. *Ib.* v. 122, p. 1149. Adderley, Colonial Policy, p. 140.

so the same power should have been retained over the larger and more important sphere of legislation entrusted to these provincial councils.^b

New Zealand government.

The provincial councils, however, were absolutely subordinate under their constitution to the central legislature, which was at liberty to control or supersede any of their laws; and, further, to modify the powers of the provincial councils themselves without reference to the Imperial parliament. The relation in which the governor stood towards the provincial councils was substantially the same as that occupied by the Crown itself towards colonial legislatures.^c In these important particulars, the provincial governments in New Zealand differed materially from the local governments, subsequently introduced into British North America.

In proof of the extensive control exercised by the general government over provincial legislation in New Zealand, it may be stated that during the continuance of the several provincial councils, no less than two hundred and sixty-six of their laws were disallowed, or refused the assent of the Crown by the governor, besides a much greater proportion of local laws which were amended or repealed by acts of the general assembly.^d

But these provincial governments were very short lived. In 1875, by an act of the general assembly,^e they were abolished; and the powers previously exercised by the superintendents and councils were transferred back to the central executive and legislature, which afterwards established county councils and other local boards throughout New Zealand for local purposes.^f

Abolition of provincial governments in New Zealand.

^b Hans. D. v. 122, p. 1166.

^c Secretary Labouchere's despatch to Governor Browne, of Dec. 10, 1856; Com. Pap. 1860, v. 46, p. 480.

^d N. Zealand House Jour. 1882, App. A. 14.

^e New Zealand Act, 39 Vic. No.

21. As to the competency of the colonial legislature to pass this act, see Lord Carnarvon's despatch of Dec. 20, 1877, in New Zealand Parl. Pap. 1878, App. A. 2, p. 6.

^f For particulars of existing systems of local government in N. Zealand and in other colonies in Aus-

b. *Provincial governments in South Africa.*

South
African
federation.

In 1877 a permissive act was passed by the Imperial parliament to provide for the union, under one government, of the British colonies and states in South Africa,^g viz. :—Cape Colony, Natal, the Orange Free State, and the Transvaal. This act appears to have contemplated the establishment of a federal union; but it merely defines the general principles intended to regulate the future constitution of the proposed union in its executive and legislative capacity. The details of the scheme were to be provided for by an order in council, to be issued so soon as the legislatures of the several colonies and states included in the act of union shall have agreed upon the same.

The renewal of hostilities with the native tribes in South Africa in 1879, and the unsettled relations of the Cape with the other colonies in South Africa in 1880, led to the indefinite postponement of the question of confederation. But the Sprigg administration, until their retirement in May 1881, continued firm in their adhesion to the policy of this measure, and were in accord with the Imperial government thereon.^h But the Imperial statute expired in August 1882.

c. *Provincial governments in Canada.*

Canadian
federation.

Following the order observed in the first part of this work, our observations upon the powers of the local governments established in Canada, under the provisions

tralasia, including constitution and revenues of the local governing bodies, see Mr. Fitzgerald's report to N. Zealand government, N. Z. Parl. Pap. 1881, A. 4, pp. 128-154; and see *ib.* 1882, App. A. 10, Town Districts Act, 1881, and act

to amend Counties Act of 1882.

^g 40 & 41 Vic. c. 47.

^h See Sir B. Frere's paper on Union of British South Africa in Royal Colonial Inst. Proc. 1881, with discussion thereon.

of the British North America Act of 1867, will be divided into two chapters. We will first consider the extent of dominion control over the several provinces in matters of legislation; and afterwards the control exercisable by the dominion government over the provinces in administrative matters.

Canadian
federation.

CHAPTER XV.

DOMINION CONTROL IN MATTERS OF LEGISLATION.

Under
British
North
America
Act.

THE British North America Act of 1867 was a formal compact, the terms of which had been previously considered and agreed upon by representatives, on behalf of the several provinces about to be confederated, and which set forth, by the supreme authority of the Imperial parliament, the mutual relations to be hereafter observed between these provinces and the dominion government.

Distribu-
tion of le-
gislative
powers.

The original parties to the compact were the provinces of Upper and Lower Canada (afterwards termed Ontario and Quebec, respectively), Nova Scotia, and New Brunswick. Subsequently, other provinces were added to the confederation, under the provisions of the Imperial statute aforesaid.^a

For the purpose of enabling the central government to undertake the supreme authority of control and general legislation in and over the entire dominion of Canada, the provinces agreed to surrender to the federal parliament the exclusive right to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects assigned (by the British North America Act) exclusively to the legislatures of the provinces. And for greater certainty, and yet not so as to restrict the generality of the legislative powers so surrendered and

^a See *post*, p. 576.

conferred upon the central government, the act proceeds to specify certain subjects which, if they concern individuals (as naturalisation or marriage) are of general operation, or which would concern or affect the whole community, and declares that 'the exclusive legislative authority of the parliament of Canada extends to all matters coming within the classes of subjects' therein enumerated.

Federal
jurisdic-
tion.

Among the subjects assigned by this act to the exclusive control and regulation of the dominion authorities, 'the sea coast and inland fisheries' are included. Consequently when, in 1879, the United States government paid over to the Imperial government, under the fishery award, which was accorded pursuant to the provisions of the treaty of Washington, the sum of five million five hundred thousand dollars, as compensation due in excess of privileges granted to American citizens by virtue of that treaty, the dominion government claimed that the portion of this fishery award which had been paid over to Canada by Great Britain, constitutionally and of right belonged to the dominion to which pertained the duty of fostering and protecting these fisheries, and not to the particular provinces in and adjacent to which these fisheries were situated. This view was upheld and confirmed by the dominion house of commons, by resolutions agreed to in amendment to proposed resolutions asserting the rights of the provinces directly concerned therein to have the said amount distributed between them.^b

On the other hand, 'all matters of a merely local or private nature in the province,' particularly if they relate to certain specified classes of subjects of local and municipal concern enumerated in the Imperial act aforesaid, are assigned to provincial control, and 'in each province the legislature may exclusively make laws in relation to' the same.^c

Provincial
jurisdic-
tion.

The true principle of interpretation, applicable to the distribution of powers under this statute, to the dominion and provincial legisla-

^b Com. Jour. April 7, 1880; 92. As to the precise meaning of Can. Sess. Pap. 1880, No. 37. This decision, however, was protested against by Prince Edward Island and Nova Scotia. See *ante*, p. 202. the term 'exclusively' in these sections of the B.N.A. act, see *ante*, p. 243. And see Gray's History of the Confederation of Canada, v. 1, p. 56.

^c Imp. Act 30 Vic. c. 3, secs. 91,

Interpre-
tation of
federal
and pro-
vincial
powers.

tures respectively,^d is pointedly expressed by Chief Justice Harrison, who states that the exclusive legislative powers assigned to the dominion parliament by section ninety-one of the British North America act are designed as examples, merely, of the powers conferred, while section ninety-two appears to enumerate all the exclusive powers capable of being exercised by the local legislatures.^e This principle was confirmed by Mr. Justice Gwynne,^f with the proviso that the subjects which provincial legislation may determine must not involve any interference with subjects assigned to dominion jurisdiction by section ninety-one. For the power of the local legislatures, though exclusive in certain specified cases, is nevertheless subject to the general, as well as to the special legislative powers of the dominion parliament, under that section.^g

Concur-
rent legis-
lative
powers.

Concurrent powers of legislation are likewise conferred, both upon the dominion parliament and the provincial legislatures, by the 95th section of the British North America act, in relation to agriculture and to immigration; but no provincial law on these subjects may be repugnant to any act of the dominion parliament, which is empowered to make laws, not merely for *all*, but for 'any' of the provinces, notwithstanding that the local legislatures have provided for the same; and under such circumstances the paramount authority of the dominion parliament is declared. And, under certain circumstances, the parliament of Canada is authorised to make remedial laws for the due execution of particular rights in respect to education, guaranteed under the British North America act, to denominational or separate schools which have been provided on behalf of either the protestant or Roman catholic minority of the inhabitants in each and every province.^h

^d See further on this point, *post*, p. 561.

^e *Ulrich v. Nat. Ins. Co.* 42 U. C. Q. B. 156.

^f *City of Fredericton v. The Queen*, Can. Sup. Ct. Rep. v. 3, p. 564.

^g See further on this point, *post*, p. 562. See also the *Mercer Case*, Can. Sup. Ct. Rep. v. 5, pp. 552, 563, 615, 658, 701.

^h Imp. Act 30 Vic. c. 3, secs. 93-95. See *Doutre*, Const. of Canada, p. 324.

Moreover, the British North America act distinctly recognises the principle of concurrent legislation in the case of 'property and civil rights' in the provinces. While such questions are ordinarily under the control and guardianship of the local legislatures yet, by section 94, the dominion parliament is empowered to provide for the uniformity of laws relative thereto, and concerning civil procedure, in Ontario, Nova Scotia, and New Brunswick, but no such law shall go into operation until it has been adopted by the local legislature.¹

Concurrent legislative powers.

'The relation of the dominion and provincial authorities to each other' has been thus defined by a learned judge of the court of common pleas in Ontario (who has since been transferred to the supreme court of the dominion): 'The Imperial or sovereign power has created several governments, one of which is made superior, to which all the others are subordinate, carved, as it were, out of the superior one, and has conferred upon the several subordinates certain municipal powers in relation to certain matters specifically enumerated, reserving to the superior, which it has designated the dominion government (so long as the Imperial act remains unrepealed), all those powers which are necessary to be enjoyed for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects assigned by the act exclusively to the provincial legislatures; and, consistently with this subordination of the provincial to the dominion government, the laws of the provincial legislatures only obtain their validity by the assent of the dominion government.'¹

Federal and provincial relations.

¹ See *post*, pp. 481, 558, 540. And see *Doutre*, Const. of Canada, p. 330. Pleas Rep. v. 29, p. 274. See also Judge Gwynne's observations to same effect in *Lenoir v. Ritchie*, Can. Sup. Ct. Rep. v. 3, p. 632; and

¹ Mr. Justice Gwynne, Ont. Com.

Concurrent legislative powers.

But, in addition to these questions, it is evident, from a consideration of the powers conferred upon the respective jurisdictions by the Imperial statute, that, in other instances, concurrent powers of legislation are exercisable by the dominion parliament, and by the provincial legislatures.

For example, while 'property and civil rights' are directly placed under local control, yet by section 94 of the British North America act, the dominion parliament is empowered to provide for the uniformity of the laws relating thereto, in certain of the provinces, with the concurrence of the local legislatures.

Moreover, the privy council have decided that the dominion parliament may legislate on matters affecting 'property and civil rights' whenever such legislation is necessary in order 'to work out the legislation upon particular subjects specially delegated to it.' Such enactments upon any subject within the ordinary jurisdiction of the dominion parliament would be no infringement upon the exclusive powers conferred on the provincial legislature. The converse of this principle has also been maintained by the courts, in respect to local legislation upon assigned topics, which may appear to trench upon prescribed dominion jurisdiction.

Again, we learn by the judgment of the privy council in the insurance cases, that a comparison and adjustment of the several powers in dealing with 'property and civil rights,' and 'the regulation of trade and commerce,' would authorise the dominion parliament to incorporate companies to carry on business in different provinces of Canada, yet that it could not claim to regulate indefeasibly the contracts affecting any particular business or trade, in a single province; because the

in *City of Fredericton v. The Queen*, *v. Robertson, Pugsley and Burbidge*,
ib. p. 560. And see Mr. Justice New Brunswick Reports, v. 2, p.
 Fisher's observations in *Steadman* 593.

provincial legislature has a right to withhold its assent from the exercise of powers so conferred by dominion authority, and to insist upon any company incorporated by a dominion statute exercising its powers pursuant to conditions prescribed by provincial legislation, as to the mode of carrying on any business within the province.

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It is, furthermore, competent for the dominion parliament to convert a corporation created by provincial authority into a dominion corporation, by enlarging the scope of its operations and powers. And even to confer upon a local corporation certain necessary powers which it would be beyond the jurisdiction of provincial authority to grant, without changing it into a federal corporation.^k Such a proceeding, however, is open to grave objection, upon grounds of political expediency, which would suggest it to be preferable, in such a case, to obtain for the existing corporation a new charter, giving it a dominion instead of a provincial existence, with whatever powers it may be desirable to confer.^l

And it has been decided that the power of the dominion parliament to pass a general law of nuisances, as incident to its rights to legislate as to public wrongs, is not incompatible with a right to the provincial legislatures to authorise municipal corporations to pass by-laws against nuisances hurtful to public health, as incidental to municipal institutions.^m

The validity of dominion legislation for the promotion of temperance has been acknowledged by the privy council; but it has also declared that a provincial legislature may empower a municipal body to regulate and limit—if not absolutely forbid—the issue of licenses for the sale of liquor within the municipality.

It has, however, been shown, by a Lower Canadian court, that the privy council, in this judgment, have not affirmed that the dominion parliament has *the sole* right to pass a prohibitory liquor law in Canada. In fact, powers have been actually conferred, by local legislation, upon municipal councils, which have been exercised

^k *Crédit Foncier Franco-Canadien Bill, 1883.*

^m *Ex parte Pillow, &c. L. Can. Jurist. v. 27, p. 216.*

^l Debate in Dom. Commons on Acadia Powder Co. Bill, April 9,

Concurrent legislative powers.

under the sanction of the courts, whereby the sale of liquors has not merely been regulated and restrained but absolutely prohibited, in aid of the maintenance of good order in the particular locality.

It has been decided that a company incorporated by a provincial legislature for the business of insurance, possesses the same powers and privileges as a company incorporated by the Imperial or dominion parliament. It may, therefore, enter into contracts outside the province with similar advantages to the companies incorporated by the larger legislatures. In other words, it may equally with them transact its business outside of the province wherever, by comity of nations or by special enactment in the outlying province, dominion, or state, its contracts may be recognised.ⁿ

These cases assert the principle of concurrent legislation in Canada, under the British North America act, and indicate a few of the occasions of its exercise.

Control over legislation in Canada by the Crown.

The precise intent of the Imperial parliament in regard to the powers to be exercised by the Crown, for the supervision and control of provincial legislation in Canada, is not very distinctly expressed in the British North America act. The constitutional doctrine on this subject may, however, be inferred by reference to the ninetieth section, which enacts that the provisions of this act relating to 'the assent to bills, the disallowance of acts, and the signification of pleasure on bills reserved,' in the case of bills passed by the dominion parliament, 'shall extend and apply to the legislatures of the several provinces, as if those provisions were here re-enacted and made applicable in terms to the respective provinces and the legislatures thereof; with the substitution of the "lieutenant-governor of the province" for the "governor-general," of the "governor-general" for the "Queen and for a secretary of state," of "one year" for "two years," and of "the province" for "Canada."'

By the British North America act, 1867, secs. 20, 86, and 88, it is provided that sessions of the parliament

ⁿ Clark v. Union Fire Insurance Co. Master's Office, v. 19, Can. Law Jour. 363.

of Canada, and of the provincial legislatures, shall be held 'once at least in every year.'

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lation.

Annual holdings of legislative assemblies are generally dispensed with in the United States. In no less than forty-three out of the forty-nine states and territories biennial sessions are now the rule.^o

The procedure upon bills passed by the dominion parliament is regulated by sections 55 to 57 of the aforesaid statute. Section 55 provides that, where a bill passed by both houses is presented to the governor-general for the Queen's assent, he shall, according to his discretion, but subject to the provisions of this act and to her Majesty's instructions, declare either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the bill for the signification of the Queen's pleasure. Bills.

Section 56 provides that, where the governor-general assents to a bill in her Majesty's name, he shall, as soon as may be, send a copy of the act to her Majesty's secretary of state, and if the Queen in council, within two years after the receipt thereof, thinks fit to disallow the act, such disallowance shall be duly notified to the proper authorities, and shall forthwith annul the same.

Section 57 provides that a bill reserved for the signification of the royal pleasure shall have no force unless and until, within two years therefrom, the assent of the Queen in council shall be promulgated.

In applying these provisions to the case of bills passed by the provincial legislatures, constituted under the authority of the British North America act, we arrive at the following conclusions:—

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(1) That inasmuch as the act empowers 'the lieutenant-governor' of each province, 'in the Queen's name, by instrument under the great seal of the pro-

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vince,' to 'summon and call together' the provincial legislature,^p and as it is a well-understood principle that all parliaments, whether federal or provincial, are opened in the Queen's name, and by her governors; and that 'legislation is carried on in her name even in provinces, as in Canada, which are directly subordinate to a federal government, instead of to Imperial authority,'^q it necessarily follows that the constitutional practice which for the most part prevails in the several provinces of the dominion, whereby the lieutenant-governor assents to or withholds his assent from bills passed by the provincial legislature, 'in her Majesty's name,' is correct; and that, in this particular, we are not warranted in substituting the name of 'the governor-general' for that of 'the Queen.'^r

It should be observed, however, that in the provinces of Nova Scotia, New Brunswick, and Prince Edward Island, bills are not enacted in the name of the sovereign, but as by 'the lieutenant-governor, the council, and assembly,' neither are they assented to in her Majesty's name, save only in the case of the annual 'Appropriation act' in Nova Scotia. This was the practice in these colonies prior to confederation, and it has since continued unchanged. But in the provinces of Quebec and Ontario (as well before as since confederation), and also in British Columbia and Manitoba, the Queen's name is invoked in giving the royal assent to bills, and is used in the enacting clause of the acts passed by the provincial legislatures; practices which, as suggested in the text, are constitutionally correct, and in accordance with the spirit of the British North America act, and which ought therefore to be uniformly observed throughout the whole dominion. (In 1881, the Queen's name was left out in the Manitoba statutes, contrary to the express directions in the Man. Consol. statutes, passed in 1880, p. 2, sec. 2). In the North-west Territories, ordinances are enacted by 'the lieutenant-governor,' 'by and with the advice and consent of the legislative assembly.'

^p See *post*, p. 584.

^q Mr. Disraeli, *Hans. D.* v. 228, p. 280.

^r See observations of C. J. Draper on this point, *in re* Goodhue,

U. C. L. J. N.S. v. 8, p. 41. These remarks, however, are omitted in the report of this case in 19 *Grant*, p. 385.

The jurisdiction of the provincial legislatures over all matters assigned to them in the distribution of powers by the 92nd section of the British North America act being absolute and 'exclusive,'^s it is evident that the assent of the Crown to the same should be directly conveyed through the lieutenant-governor, who is the authorised representative of the sovereign in and towards the local legislature.^t Within the prescribed sphere of provincial legislation, neither the governor-general nor the dominion parliament have any statutory right of interference. It is only in the administration, on behalf of the Crown, of the prerogative of control and disallowance over provincial enactments, which is transferred by the new constitution from the Queen in council to the governor-general of the dominion and his responsible advisers, and is exercisable within certain exceptional limits,^u that the governor-general is competent to interpose. In this view it is obviously incorrect to use the name and authority of a governor, lieutenant-governor, or governor-general for the validation of a provincial statute. Moreover, under any circumstances, 'the royal assent' to legislative acts can only be constitutionally given or withheld 'in the name of' the sovereign.^v The 'name of the governor-general,' who himself exercises merely a delegated authority,^w cannot be invoked for any such purpose. The diversity of practice in this particular, as also in the enacting clause of colonial statutes, has existed from the earliest times in the old colonies of British America, and still continues in certain of the Canadian provinces,^x as well

^s See *post*, pp. 526, 578.^t See *post*, p. 589.^u See *post*, pp. 457, 511-529.^v See *post*, p. 584; and *ante*, p. 162. This was the form prescribed for use in Upper and Lower Canada by the Constitutional act of 1791 (31 Geo. III. c. 31, sec. 30), and the

use of the same formula, at least in the provinces of Ontario and Quebec respectively, is obviously confirmed and enjoined by sec. 65 of the B.N.A. act.

^w See *ante*, p. 202.^x See Stokes on Colonies (pub. in 1783), p. 244.

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as in the colony of Natal,^y so far, at least, as concerns the enacting clause of bills.

(2) That nevertheless, whenever, 'according to his discretion,' the lieutenant-governor shall see fit to 'reserve' a bill presented to him for the royal assent, he should declare that he reserves the same 'for the signification of the pleasure of his excellency the governor-general,' inasmuch as, in such a case, it is manifestly intended by the British North America act that the term 'governor-general' should be substituted for that of 'the Queen,' as indicating the functionary by whom, under such circumstances, the assent or dissent of the Crown is to be declared. This is the interpretation which is put upon the act by constitutional practice in all the dominion provinces.^z And the soundness of this conclusion is confirmed by the obvious intendment of the act, in regard to the disallowance of provincial acts, as hereinafter stated.

(3) That, whenever the lieutenant-governor shall have assented in the Queen's name to a bill passed by the provincial legislature, it becomes his duty promptly to forward a copy thereof to the governor-general, in order that if the governor-general in council should see fit, within one year after the receipt of the said act, to disallow the same, such disallowance may be duly notified to the provincial authorities concerned therein. This also is in accordance with constitutional practice in the dominion provinces.^a

(4) And finally, with respect to provincial bills which have been reserved for the signification of the governor-general's pleasure, it is clear that no such bill can have any force, or go into operation, unless and

^y Royal instructions to governor 1873, p. 374. Nova Scotia Assem. of Natal, Com. Pap. 1882, v. 47, p. 399. Jour. May 7, 1874.

^a Ont. L. A. Jour. 1869, p. 126.

^z Ontario Leg. Assem. Jour.

until, within one year^b from the date of its being reserved by the lieutenant-governor, the governor-general shall intimate that the same has received the assent of the governor-general in council; and an entry of such formal announcement shall be kept in the records and legislative journals of the particular province. Bills.

We have still to consider whether the governor-general, in determining, according to his discretion, what shall be the judgment of the Crown in respect to bills passed by the provincial legislatures, and whether they shall be disallowed or confirmed, fulfils this function as an Imperial officer and subject to instructions received from the secretary of state, or whether he is bound to be guided by the advice of his ministers, who are themselves responsible to the dominion house of commons. Powers of governor-general over provincial legislation.

This question is not without difficulty, as well in relation to the general principles of responsible government, as in its bearing upon those sections of the British North America act which confer upon each province of the dominion exclusive powers of legislation, in regard to certain specified matters of local concern. In fact, it has given rise to an interesting controversy between the Imperial government and the advisers of the Crown in Canada. A brief review of the progress and termination of this controversy may enable us to arrive at a definite conclusion upon this vital and important subject.

Shortly after the confederation of the provinces of British North America had been accomplished, and after the close of the first session of the newly established provincial legislatures, this question presented itself for

^b In 1879, by inadvertence, the despatch signifying the governor's assent to a reserved bill from Prince Edward Island was not received by the lieutenant-governor until four days after the expiring of the year. Accordingly, the bill had to be re-enacted in the following session. Can. Sess. Pap. 1882, No. 141, p. 174.

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practical solution. The minister of justice for the dominion was requested to advise the governor-general as to the proper course to pursue with respect to acts passed by the provincial legislatures. In commencing his first report on this subject, the minister drew attention to the fact that 'the same powers of disallowance as have always belonged to the Imperial government, with respect to the acts passed by colonial legislatures, have been conferred by the union act on the government of Canada.' But that 'under the present constitution of Canada, the general government will be called upon to consider the propriety of allowance or disallowance of provincial acts much more frequently than her Majesty's government has been with respect to colonial enactments.'^c

How to be
exercised.

The importance of establishing a correct constitutional practice, in the exercise of the weighty and responsible duties devolving upon him, under these circumstances, induced the governor-general of Canada (Sir John Young) to apply to the secretary of state for the colonies (Earl Granville) for instructions on this matter. In a despatch dated March 11, 1869, he noticed that, while the union act provided that the lieutenant-governor of each province might reserve bills for the consideration of the governor-general, there was no provision requiring the governor-general to take her Majesty's pleasure on such legislation. The royal instructions are also silent on this point. Sir John Young, therefore, presumed that he 'should exercise the power of assent to, or reservation of, bills under the advice of the privy council of this dominion.' But bearing in mind the necessity for arriving at some principle of action which should be approved by her Majesty's go-

^c Memorandum from the (Donald), dated June 8, 1868. Canadian minister of justice (Sir J. A. Mac- ada Sess. Pap. 1870, No. 35, p. 6.

vernment, and steadily adhered to, he submitted that it was desirable, in a public point of view, that he should receive some specific instructions, as an Imperial officer, as to his course in such a contingency.

In reply to this despatch, Earl Granville pointed out that, in the event of a provincial act being passed, which in the opinion of the governor-general was 'gravely unconstitutional,' or in excess of the power of the local body, or in violation of the royal instructions for the reservation of laws which are objectionable on grounds of Imperial policy, he was not at liberty, even on the advice of his ministers, to sanction or assent to any such law. If such advice were given, 'it would be his duty to withhold his sanction and refer the question to the secretary of state.' On the other hand, 'if he were advised by his ministry to disallow any provincial act, as illegal or unconstitutional, it would, in general, be his duty to follow that advice, whether or not he concurred in their opinion.'^d

Controversy between Imperial and dominion governments concerning provincial legislation.

This despatch appeared, at the time, to be so satisfactory to the dominion government, that by an order in council, dated July 17, 1869, the secretary of state for the provinces was directed to forward the same, together with a paragraph from the royal instructions to the governor-general—in reference to the assent, disallowance, and reservation of bills presented for his sanction—to the lieutenant-governors of the several provinces of the dominion.^e

In conformity with this interpretation of the duty of the governor-general in dealing with provincial acts, it was stated by the registrar of her Majesty's privy council, in an official letter which, on December 13, 1872, he addressed to the under-secretary of state for the colonies, that, in the opinion of the lord president

^d Canada Sess. Pap. 1870, No. 35, pp. 3, 4.

^e *Ib.* pp. 25-27.

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of the privy council, 'the power of confirming or disallowing provincial acts is vested by the statute [i.e. the British North America act of 1867] in the governor-general of the dominion of Canada, acting *under the advice* of his constitutional advisers;' and that her Majesty in council has no jurisdiction therein.^f

Subsequently, however, the Earl of Kimberley—the then secretary of state for the colonies—in a despatch to the governor-general of Canada, dated June 30, 1873, in reference to the proposed disallowance of certain acts of the New Brunswick provincial legislature, passed in 1873, in relation to common schools, and which were within the competence and jurisdiction of that body, declared 'that this is a matter in which you must act on your own individual discretion, and on which *you cannot be guided by the advice* of your responsible ministers.'^g

This discrepancy of opinion upon a question of such gravity and importance attracted the attention of the Canadian ministers. A committee of the dominion privy council was appointed to consider it; and they reported, on March 8, 1875, their opinion that, in their view of the construction of the British North America act, the governor-general was required to exercise the power of assent or of disallowance to provincial legislation, in the same manner as he fulfilled other functions of government; that is to say, *upon the advice* of his ministers. This conclusion was communicated to the secretary of state for the colonies by the governor-general.

The Earl of Carnarvon, who had succeeded Lord Kimberley as colonial secretary, was not disposed to accept this principle. But, in a despatch to the

^f Canada Sess. Pap. 1876, No. 116, p. 85.

^g *Ib.* 1874, No. 25, p. 13.

governor-general, dated November 5, 1875, he states that, should it become a matter of practical urgency to decide the point, it could be finally decided only upon an appeal to the judicial committee of the privy council from the judgment of a colonial court upon the construction of the Imperial statute. He nevertheless expressed his opinion that it would be more in accordance with the spirit of the constitution that no rigid rule of action, in such cases, should be laid down; but that, in conformity to the instructions given to the governors in Australia, in the exercise of the prerogative of mercy, 'the governor-general, after having had recourse to the advice of his ministers—whom the [dominion] parliament holds answerable for advising him as to all his public acts (though not, in all cases, for the acts themselves)—may properly be required to give his own individual decision as to allowance or disallowance.'

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'The constitutional remedy for any prolonged difference of opinion between the governor-general and his advisers would be the same in this as in any other case of a similar nature. Holding, as I have already explained, the opinion that the constitution of Canada does not contemplate any interference with provincial legislation on a subject within the competence of the local legislature by the dominion parliament—or, as a consequence, by the dominion ministers—I assume that those ministers would not feel themselves justified in retiring from the administration of public affairs on account of the course taken by the governor-general on such a subject; it being one for which the dominion parliament cannot hold themselves responsible, although it may demand to know what advice they gave.'^h

Ministerial responsibility.

^h Canada Sess. Pap. 1876, No. 116, pp. 83, 84.

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The foregoing despatch was referred by the governor-general in council to the minister of justice (Mr. Edward Blake) for his consideration. On December 22, 1875, Mr. Blake submitted an elaborate report to council, which traversed the whole ground taken by the colonial secretary. It denied the applicability of his argument from the analogous position of a governor administering the prerogative of mercy; inasmuch as the powers of provincial legislatures are strictly limited to certain subjects of a domestic character, so that their legislation can only affect provincial, or at most Canadian, interests. And, if they transcend their constitutional competence, any acts in excess of their powers are inoperative *ab initio*.

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provincial
statutes.

Mr. Blake, moreover, contended that inasmuch as, by the British North America act, the power of disallowing provincial enactments is expressly vested in 'the governor-general in council,' in substitution for the jurisdiction which was exercised by the Crown over legislation in the same provinces, when they were directly subordinate to 'the Queen in council,' it follows that the Canadian ministers must be directly and exclusively responsible to the dominion parliament for the action taken by the governor, in any and every such case; and that a governor who thinks it necessary that a provincial act should be disallowed must find ministers who will take the responsibility of advising its disallowance. While, on the other hand, ministers who think it necessary that a provincial act should be disallowed must resign, unless they can secure the consent of the governor to its disallowance; ministers being in every case responsible to parliament for the advice given, and for the action consequent on such advice.ⁱ

ⁱ Canada Sess. Pap. 1876, No. 116, pp. 79, 83.

This report from the minister of justice was concurred in by the cabinet, and approved by the governor-general in council on February 29, 1876. And on April 6, 1876, it was forwarded by his excellency for the consideration of the Imperial government.

Ministerial responsibility in disallowing provincial acts.

The secretary of state for the colonies in acknowledging, on June 1, 1876, the receipt of this report, reiterated his convictions that an authoritative decision, upon the difficult question at issue between the Imperial and colonial governments, could only be obtained through the instrumentality of the judicial committee of the privy council, in giving a judgment on appeal upon the construction of the British North America act.

Meanwhile he invited the Canadian ministers to consider another aspect of the question, but which he did not now wish to press, in opposition to their views. In sections ten and thirteen of the act aforesaid, a distinction is drawn between 'the governor-general' and 'the governor-general in council,' which distinction is observed throughout the statute. It might then be urged that inasmuch as 'the governor-general' alone is charged in the ninetieth section with the duty of deciding upon the allowance or disallowance of provincial acts, it was the intention of the Imperial parliament that the exclusive responsibility of determining such questions should devolve upon the governor-general personally; for, if his ministers had power to control his decisions upon provincial acts, it would be tantamount to a repeal of that portion of the British North America act which confers an exclusive right to legislate upon certain matters on the provincial legislatures.

This despatch was referred by the Canadian cabinet to the minister of justice. Upon his report, a minute of council was passed, and approved on September

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19, 1876, by the governor-general, to the following purport.

It was unlikely that the question of ministerial responsibility in connection with the disallowance of provincial acts could be brought on appeal before the privy council, unless the governor-general should claim to disallow an act independently and without the agency of his ministers; in which case it might be questioned whether the act was effectually disallowed.

The colonial secretary's suggestion, that by the omission of the words 'in council,' in the ninetieth section, the act meant to confer an independent power upon the governor-general, is at variance with the general intention of the clause. It is more reasonable to suppose that these words were omitted for the sake of brevity, and to avoid unnecessary repetition.

As to the apprehension expressed that the Canadian ministers might abuse the power of controlling by their advice the decisions of the governor-general upon provincial acts, no such consideration would be valid against the true construction of the statute, although it might be a reason, if well founded, for a change in the law. But, in fact, the Canadian ministers representing the several provinces of the confederation, and dependent for their continuance in office upon their retaining the confidence of the confederate parliament, are most unlikely to disregard provincial rights under any circumstances; and any such abuse of power would be quickly followed by disastrous consequences to themselves. We have, indeed, a greater security that this power will be wisely exercised, upon the advice of the Canadian ministers, than exists in the exercise by the Queen in council of the power of disallowing acts of the dominion parliament, because for any such proceeding in Canada ministers would be held responsible to the Canadian people.

The governor-general cannot be supposed to be capable of determining such questions upon his own unaided judgment; neither ought he to act upon the counsel of persons who are not his constitutional advisers, or upon instructions from the colonial office, which would render the Imperial authorities responsible in the case. The important and difficult questions arising out of the exercise of this prerogative can, therefore, be prudently and wisely solved by the governor-general only as he acts upon the advice of his responsible ministers, who, whether they be more or less accountable for the same, will naturally influence his decision very materially.

Ministerial responsibility in disallowing provincial acts.

This report was duly transmitted to the colonial secretary, who, in a despatch to the governor-general of October 31, 1876, commented thereon. He acknowledged the force of Mr. Blake's arguments, and the propriety of his conclusions in general, which, he allowed, were sustained by high authorities in England, but still inclined, for his own part, to prefer a construction of the British North America act which would permit of the governor-general acting independently of his ministers in deciding upon the allowance or disallowance of provincial acts.

Admitting that the governor-general could not and ought not to act upon his own unaided judgment, the colonial secretary suggested that he should invariably have recourse to the advice of his ministers before deciding upon such questions. He would then be acting *under* the advice of his ministers, although he might not be willing to act *according* to their advice.

But this conclusion failed to satisfy Mr. Blake. In a further report, in answer to the aforesaid despatch, the minister of justice demurs to the assumption that the governor-general is aided by his ministers' advice, when he arrives at a decision adverse thereto, which

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must be based upon opposite considerations, entertained solely by himself. And he reaffirms the position for which he had contended throughout this controversy, 'that, under the letter and spirit of the constitution, ministers must be responsible for the governor's action.' 'He regrets that the discussion has not resulted in an agreement, but ventures to hope that it has, at any rate, decreased the probability of future difficulty on a question of very grave importance.' This report was approved by the governor-general in council, on Nov. 21, 1876, and ordered to be transmitted to the secretary of state for the colonies. On Jan. 4, 1877, its receipt was acknowledged by the colonial secretary, but without further comment or observation.¹

Settlement of controversy between Imperial and dominion governments.

In reviewing this ably conducted correspondence, we may remark that the controversy between the Imperial and dominion governments took a different shape as the discussion proceeded. At first, a distinct claim was preferred by her Majesty's secretary of state for liberty to review, and under certain exceptional circumstances to disallow, provincial legislation, through instructions to the governor-general as an Imperial officer. Afterwards this ground was abandoned, and the constitutional propriety, if not the abstract right, of the Imperial government to interfere with provincial legislation, unless in extraordinary cases and under very exceptional circumstances, was no longer urged. The secretary of state then claimed that the governor-general personally had an 'independent' right (without the consent of his ministers, whether actual or prospective) to determine upon the expediency of allowing or disallowing provincial statutes; and in proof of this contention he appealed to the wording of the British North America act. Mr. Blake's argument was directed to show the inconsistency.

¹ Canada Sess. Pap. 1877, No. 89, pp. 449-458.

of this position, with an acknowledgment of the principle of self-government in matters of local concern.

It would seem, however, that some points, which are material to the solution of the question, appear to have been overlooked on both sides. They may be stated as follows:—

Ministerial responsibility in disallowing provincial acts.

(1) The ninetieth section of the British North America act, which substitutes 'the governor-general' for 'the Queen,' as the executive authority which is ultimately empowered to give or withhold the assent of the Crown to bills passed by the provincial legislatures, and which the secretary of state for the colonies would construe as applying to the governor-general, acting independently of his ministers, refers not merely to the allowance or disallowance of provincial enactments, but likewise to the action of 'the governor-general' in relation to appropriation and tax bills, and in the recommendation of money votes. All these matters are embraced in the same category, and if the governor-general can act, under the powers conferred upon him by this clause, independently of his ministers, in the one case, he can do so, of equal right, in all the cases enumerated. This would be obviously unconstitutional, which plainly shows that the secretary of state's interpretation of the clause is untenable. It is then more reasonable to infer that the term 'governor-general,' in this clause, was not made use of simply for the sake of brevity, and to avoid needless repetition, which would be an unwarrantable excuse for obscure phraseology in such an important and authoritative document, but as being a sufficient and appropriate antithesis to the term employed to designate the Imperial executive authority in the fifty-sixth clause (which is intended to be read in connection with clause ninety), and where the term 'Queen in council' is used in reference to the disallowance of dominion acts. Of course the Queen, in declaring her

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approval or disapproval of such enactments, can only do so 'in council.' In the corresponding action of the governor-general, in reference to provincial legislation, it is equally clear that he should act 'in council:' inasmuch as his functions are performed, in a colony where responsible government prevails, under the same constitutional restrictions as those of the sovereign, in relation to bills passed by the Imperial parliament.

The late Sir John A. Macdonald, in an official memorandum, stated: 'Long before confederation, the principle of what is known as "responsible government" had been conceded to the colonies now united in the dominion. . . . Whether therefore, in any case, power is given to the governor-general to act individually or with the aid of his council, the act, as one within the scope of the Canadian constitution, must be on the advice of a responsible minister. The distinction drawn in the statute between an act of the governor and an act of the governor in council is a technical one, and arose from the fact that in Canada, for a long period before confederation, certain acts of administration were required by law to be done under the sanction of an order in council, while others did not require that formality. In both cases, however, since responsible government has been conceded, such acts have always been performed under the advice of a responsible ministry or minister.'^k

(2) As a matter of fact, ever since the passing of the British North America act, the governor-general of Canada has invariably decided upon the allowance or disallowance of provincial laws, on the advice of his ministers, and has never asserted a right to decide otherwise. He has been always content to exercise this prerogative under the same constitutional limitations and restraints which apply to all other acts of executive authority in a constitutional monarchy.

(3) If, on the contrary, the governor-general had assumed that he was competent to act in such cases independently of his ministers, it could only have been in virtue of his position as an Imperial officer, himself

^k Com. Pap. 1878-79, v. 51, p. 153.

responsible to his sovereign, and for whose acts in that capacity the Queen's ministers were directly accountable to the Imperial parliament. But it has been distinctly and repeatedly declared by her Majesty's government (as will be seen in the precedents hereinafter cited) that the Queen in council claims no jurisdiction over provincial legislation; that the only tribunal before which any provincial enactment could be questioned was that of the governor-general; and that no Imperial secretary of state would undertake to advise an interference by the Crown with the action or determination of the governor-general in such matters. Should there be an apparent failure of justice by reason of a provincial act being left to its operation, redress could only be obtained upon application to the provincial legislature from whence the act had emanated; or, in the event of a presumption that a particular statute had been illegally enacted, by recourse to a court of competent jurisdiction to decide whether or not the statute was valid and effectual.

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On this head it has been pertinently remarked by an eminent Canadian judge, that 'it is not to be expected that the governor-general in council will be so far able to examine all acts passed by the provincial legislatures as to foresee all possible constitutional difficulties that may arise on their construction; and, therefore, an omission to disallow is not to be deemed in any manner as making valid an act, or a part of an act, which is essentially void, as being against the constitution.'¹

In deciding upon the validity or expediency of provincial enactments, the governor-general in council has no arbitrary discretion. The decision of the dominion

¹ C. J. Harrison, in *Leprohon v. v. Wood*, 5 E. & B. 49, 55), 40 The City of Ottawa (citing the Queen U. C. R. 490.

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government upon all such questions must be in conformity with the letter and spirit of the British North America act. That statute has been correctly termed 'the great charter of our constitution.' It recognises and guarantees to every province in the confederation the right of local self-government in all cases within the competency of the provincial authorities. And it does not contemplate or justify any interference with the exclusive powers which it entrusts to the legislatures of the several provinces; except in regard to acts which transcend the lawful bounds of provincial jurisdiction, or which assert a principle, or prefer a claim, that might injuriously affect the interests of any other portions of the dominion, or in the case of acts which diminish rights of minorities in the particular province in relation to education, that had been conferred by law in any province prior to confederation.^m These principles must be studiously kept in view, and steadily maintained, whenever the legislation of any province is submitted to the constitutional criticism of the governor in council. Otherwise, there would be a danger not merely of the infraction of local rights guaranteed by the Imperial parliament, but as a necessary result of any such violation of the principle of local self-government, of a disruption of the bond which unites together the several portions of the Canadian dominion. And these considerations should equally influence the two houses of the dominion parliament whenever they are invited to express an opinion upon questions which it may appertain to the provincial authorities to determine.

It is, indeed, a supposable case, that a provincial act

^m British North America act, 1867, secs. 92-95. And see memorandum of Sir John A. Macdonald (minister of justice) of Aug. 26, 1873, in reference to certain Orange Society incorporation acts, passed

by the Ontario legislature, Ontario Sess. Pap. 1st Sess. 1874, No. 19. And Earl Carnarvon's despatch to Earl Dufferin, of Nov. 5, 1875. See further on this point, *post*, pp. 461-477.

might come under review by the dominion governor in council which should be found to contain provisions 'of an extraordinary nature and importance'—such as, if the bill had been enacted by the dominion parliament, the governor under the royal instructions would be required to reserve it for the signification of the royal pleasure thereon—and that the Canadian privy council might deem it expedient to advise that this particular measure should be permitted to go into operation, contrary to the opinion of the governor-general. Whatever proceedings the governor-general might be competent to take in such a contingency in order to vindicate his own judgment in the matter, it is obvious that under the British North America act he would not be at liberty to reserve the bill for the consideration of the Crown, unless upon the advice and with the consent of his ministers for the time being, inasmuch as it has been authoritatively stated, on behalf of her Majesty's government, that 'the power of confirming or disallowing provincial acts is vested by statute in the governor-general of the dominion, acting under the advice of his constitutional advisers;' and that that statute does not confer upon 'her Majesty in council any jurisdiction over' such questions, though 'it is conceivable that the effect and validity of' any provincial enactment might at some future time 'be brought before her Majesty on an appeal from the Canadian courts of justice.'ⁿ

Ministerial responsibility in disallowing provincial acts.

Before we proceed to consider the constitutional practice which regulates the exercise by the dominion government of its lawful control over provincial legisla-

Precedents on this question.

ⁿ Opinion of the lord president of the privy council (the Marquis of Ripon), in December, 1872, quoted in Canada Sess. Pap. 1876, No. 116, p. 85. See also *post*, p. 512. See Mr. Justice Gwynne's remarks in the Mercer Case, Can. Sup. Ct. Rep.

v. 5, p. 711. The extent to which the legal right of interpretation and control over provincial legislation is exercised by the courts of law is elsewhere considered. See *post*, p. 537.

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tion, we may suitably direct attention to a series of precedents which confirm and establish the points we have already ascertained; namely, that under the British North America act the control of the Crown over the provinces of the Canadian dominion is now exercised not directly by Imperial authority, but indirectly through the instrumentality of the dominion government, and that it is incumbent upon the governor-general in council, in the exercise of his constitutional supremacy, to respect the rights of the provinces in matters of local legislation, so far as the same are defined by the British North America act.

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In 1871, an act passed by the provincial legislature of New Brunswick, in relation to common schools, came under review by the dominion government. Numerous petitions, from the Roman catholic inhabitants of the province, were presented to the governor-general, praying that this act might be disallowed, as being an infringement upon the rights which they enjoyed, as a religious denomination, at the time of confederation. But whereas the provincial legislatures possess, under the ninety-third section of the British North America act, exclusive powers of legislation in educational matters, subject only to the right of the dominion parliament to make remedial laws, under certain specified circumstances, the governor-general was advised by the minister of justice, on Jan. 20, 1872, that he had no right to intervene, and should allow the act in question to go into operation. If any religious body was aggrieved thereby, they 'should appeal to the provincial legislature, which has the sole power to grant redress.'

However, on May 30, 1872, a motion was made in the dominion house of commons for an address to the governor-general, praying him to disallow the aforesaid statute. To this motion an amendment was proposed, deprecating such a proceeding, on the ground that the act was strictly within the competence of the provincial legislature, whose powers ought not to be impaired by the dominion parliament. It was then proposed, as an amendment to this amendment, to address her Majesty in favour of the amendment of the British North America act, so as to secure to every religious denomination in New Brunswick the rights which they enjoyed at the time of the union with Canada in regard to schools. These several motions were negatived, and a resolution agreed to, expressing regret that the aforesaid New Brunswick statute should have proved unsatis-

factory to the Roman catholics in that province, and a hope that it might be so modified at the next session of the provincial legislature as to remove any just cause of discontent; and declaring that it is expedient to obtain the opinion of the Crown law officers in England (and if possible of the judicial committee of the privy council), as to the right of the New Brunswick legislature to make such changes in the school law as would deprive Roman catholics of the privileges they possessed, prior to the union, in respect of religious education; so as to determine whether the parliament of Canada would be warranted to intervene, under the fourth sub-section of the ninety-third clause of the British North America act, with remedial legislation in their behalf.

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Application was accordingly made, through the governor-general, for the opinion of the Imperial Crown law officers on this question. Amongst the papers submitted to these officers was a memorandum from the executive council of New Brunswick, dated Dec. 23, 1872, protesting against any interference, by the dominion house of commons, with the exclusive powers assigned to the provincial legislature by the confederation act, and deprecating any reference of the case to the law officers of the Crown in England. The competency of the New Brunswick legislature exclusively to frame laws on this subject was afterwards affirmed by the unanimous judgment of the supreme court in that province, who further held that the dominion parliament possessed no power of remedial legislation in the matter.^o

Meanwhile, in compliance with the aforesaid resolution of the Canadian commons, the Crown law officers, as well as the lords of the privy council, were applied to, by the governor-general, for their opinion upon the case. On November 29, 1872, and on February 12 and April 7, 1873, the law officers of the Crown reported that, upon full consideration of the question before them, they agreed with the dominion minister of justice that the provincial legislature was competent to pass the school act, and that no case had been made out to warrant an interference with that statute; or that would 'bring into operation the restraining powers, or the powers of appeal to the governor-general in council, and the powers of remedial legislation in the parliament of the dominion, contained in the ninety-third section' of the British North America act. The lord-president of the council, under date of December 13, 1872, declined to interfere, for the reason already stated; namely, that the power of confirming or disallowing provincial acts was vested by law absolutely and exclusively in the governor-general in council.^p

^o Pugsley, New Brunswick Reports, v. 1, p. 273.

^p Canada Sess. Pap. 1877, No. 89, pp. 343-428. And see *ante*, p. 442.

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Upon the commons of Canada being notified of this result, they agreed to another resolution, on May 14, 1873, wherein they declared their opinion that the parties aggrieved by the New Brunswick school act of 1871 should have an opportunity of bringing the matter judicially before the privy council; and that meanwhile the governor-general should be advised to disallow certain acts passed at the last session of the New Brunswick legislature, to legalise assessments made under that statute, and to amend the same. This resolution was carried against ministers. His excellency, however, being advised that the aforesaid statutes sought to be disallowed were, equally with the act of 1871, within the competence of the provincial legislature, authorised the minister of justice to inform the house of commons that he was not prepared at present to comply with their request; but that, in accordance with the advice of his ministers, he should submit the question for the consideration of the Imperial government.

The supreme court of New Brunswick having, as we have seen, affirmed the constitutionality of the act of 1871, and no appeal from their judgment having as yet been made to the privy council, notwithstanding that the dominion parliament had granted moneys to defray the cost of an appeal, the executive council of New Brunswick, on May 19, 1873, addressed a further protest to the governor-general against the interference of the house of commons in the matter. The council claimed for the dominion government entire freedom in dealing with questions expressly reserved to the control of the provincial legislatures, and asserted that the house of commons ought to abstain from endeavouring to control the government in cases wherein the dominion parliament had no right to legislate. They declared that the establishment of a contrary principle would destroy the federal character of the union and the independence of the local legislatures.

The governor-general reported these particulars to the secretary of state for the colonies on May 27, 1873, with a request for instructions as to the course he should pursue. The colonial secretary in his reply, dated June 30, 1873, informed the governor-general that the acts in question, being within the powers of the local legislature and in agreement with the general spirit of the act of confederation, ought to be allowed to remain in force, and could not constitutionally be interfered with by the house of commons. Otherwise, the exclusive right of legislation in such questions, conferred by the act of union upon the provincial legislature, would be virtually annulled.^a

^a Canada Sess. Pap. 1874, No. 25, pp. 8-13.

At this juncture, another occasion arose for testing the legality of the common-school acts before the courts of law, and of obtaining, as the result proved, a decision of the judicial committee of the privy council thereon. In Hilary term, 1873, a Mr. Maher, a Roman catholic resident in the town of Portland, New Brunswick, who had been assessed under the said acts, applied to the supreme court for a rule *nisi*, calling on the town council to show cause why a writ of *certiorari* should not be issued to bring the order of assessment into court, with a view to its being quashed; on the ground that the act under which the assessment was made was *ultra vires*, and in contravention of the British North America act. The court, however, upheld the legality of the statutes, and of the assessments made under the same. An appeal was then brought before the judicial committee of the privy council from this decision. It was argued in July, 1874; but their lordships, without calling upon the respondents, gave judgment confirming the decision of the court below, and dismissing the appeal with costs.*

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The exclusive jurisdiction of the New Brunswick legislature in the disposal of this question having been thus acknowledged, as well by the Imperial and dominion governments as also by the privy council, no alternative remained to the dissentients but to appeal to the New Brunswick assembly. Accordingly, in the years 1873 and 1874, numerous petitions were presented to that body, asking for such an amendment of the common-school act of 1871 as would secure to Roman catholics in that province 'separate schools.' But, after careful inquiry and consideration, the house of assembly on March 4, 1874, resolved, that it was inexpedient to grant special rights and privileges, in respect to denominational education, to any class of persons. The house also protested against any attempts, either by the Imperial parliament or by the dominion government, to impair or curtail the privileges and powers of the provincial legislature, without its own previous consent and the sanction of the people.^s

On March 10, 1875, the dominion house of commons addressed the Queen, representing the inexpediency and danger of any Imperial legislation that would encroach upon the powers reserved to the provinces by the British North America act; but expressing regret

* *Ex parte* Maher is an unreported case. The judgment of the judicial committee is also unreported, but will be found in the London 'Times,' of July 18, 1874, p. 11, col. 4; also in the Toronto 'Globe' of July 31, 1874. See

also judgment of Ontario Court of Chancery in case of Belleville Separate Schools, 25 Grant's Chy. p. 570.

^s Canada Sess. Pap. 1877, No. 89, p. 430.

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that their anticipations (on May 29, 1872) that the New Brunswick school act would be so modified by the provincial legislature as to remove any just ground of discontent had not been realised; and praying her Majesty to exert her influence with that legislature to bring about the desired result. This address was forwarded to the Queen through the proper channel.

On October 18, 1875, a reply to this address was embodied in a despatch from the colonial secretary (Lord Carverton), which concurred in the opinion that Imperial legislation to curtail the powers vested by law in the provincial legislature would be an undue interference with the local constitutions and with the terms of union. But equally the secretary was unable to advise her Majesty to take action upon this address; inasmuch as her direct intervention in the matter would be liable to the same objections. He could only express a strong hope that the ruling majority in New Brunswick might be disposed so to exercise their undoubted rights as to remove all reasonable causes of complaint, and so avoid the 'serious inconvenience [of] bringing under public discussion in the dominion legislature a controverted question which may possibly engender much heat and irritation, and over which it has no jurisdiction.'^t

This expectation, however, has not been realised; and separate schools are not yet established by law in New Brunswick.

A satisfactory solution of the much-vexed school question was finally effected, however, through the instrumentality of the Senator for St. John—the Hon. John Boyd. After much bitter contention and strife between the protestant and catholic parties, worked up to such fever pitch that the extreme measure of seizing the bishop's private property had been resorted to in order to secure payment of the school tax, Bishop Sweeny invited Senator Boyd—chairman of the school board—to consult with him, with a view to a possible settlement of the dispute. As a result of several interviews between these gentlemen—the senator having been delegated by the board a committee to negotiate in its interests—the bishop consented to place his children under the charge of the board, with the understanding that the Roman catholic school houses would

^t Canada Sess. Pap. 1877, No. 89, p. 434.

be taken by the board, during school hours, at a certain rental; that their teachers who passed the government examinations be retained in their places; and catholic lay teachers appointed by the board—whose trustees are now composed of catholics and protestants—that had been educated in the normal school, to fill the place of the Christian Brothers who had declined to come in under the change.

After twenty years' experience of this united system of teaching from the same books, Senator Boyd writes that there are no differences or complaints existing on either side, and adds with reference to the settlement of the question:—

'The bishop from his cathedral pulpit thanked me by name for the way in which he was met; no man could have acted in a more Christian spirit, and no act of Bishop Sweeny's life has done so much as this to bring about that spirit of harmony between catholics and protestants which at one time did not prevail here. . . . We try, and do manage, to have catholics in charge of catholic children—although this is not named in our rules—but for protestant children either are appointed; the second teacher in the high school to-day being a catholic and the head teacher a protestant. The catholic teachers may read on opening the schools in the Douay version of the Testament; the protestant teachers, the King James's version, and the Lord's Prayer by each. Bishop Sweeny asked that in their schools they be permitted to put up the picture of the crucifixion of Christ. This, the emblem of our common faith, is the only religious symbol we use.

'Under the same board—with one system of instruction, one set of rules, one set of books, not asking where we worship God—we have in New Brunswick, I believe, the most perfect system of education in the world.'

A question, similar in principle to the foregoing, was raised in Prince Edward Island by its Public Schools Act of 1877.

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That act repealed all existing laws on the same subject, and made new provision on behalf of education in the island. But, according to the law of the province, the system of education had always been non-sectarian; and, in this respect, the new law made no change.

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Nevertheless, in practice, certain exceptional advantages had been enjoyed under the old law by various French schools in the island, wherein the Roman catholic minority had gradually introduced books not legally authorised to be used. Inasmuch as such exceptional practices could not be continued under the new act, the Roman catholic bishop of the island memorialised the lieutenant-governor to reserve the bill for the consideration of the governor-general in council, on the ground that it interfered with the rights of the French Roman catholic population to possess 'separate' schools—which rights, he claimed, were intended to be secured to them under the ninety-third section of the British North America act.

The lieutenant-governor declined to reserve the bill, but undertook to forward any memorial against it to the dominion government, by whom it could, if illegal or unjustifiable, be disallowed.

In transmitting petitions against the act to the governor-general, the lieutenant-governor also forwarded a report from his executive council on the question, wherein the constitutionality of the act was affirmed, and the claims urged against it for separate and exclusive rights to the French Roman catholics were shown to be unwarranted by law, and contrary to the policy of free, non-sectarian education, heretofore established in the island.

The minister of justice for Canada, in a careful review of the case, dated November 8, 1877, affirmed the legality of the public-schools act, and denied that the French schools above referred to by the Roman catholic bishop 'were denominational by law whatever may have been the course of instruction carried on in them;' or that any denomination had the right, under the previous laws, 'to establish a separate or denominational school, not under the control of the board of education.'

Admitting that some of the provisions of the new act appeared to be severe and somewhat arbitrary, and recommending that the attention of the lieutenant-governor should be called to them, to consider the expediency of certain amendments thereto, the minister of justice was nevertheless of opinion that the act should be left to its operation; and that it was not 'proper for the federal authority to attempt to interfere with the details or accessories of a measure of the local legislature, the principles and objects of which are entirely within their province.' This report was approved by the governor-general in council, and the act permitted to continue in operation.^a

However, a solution of the difficulty—in so far as a harmonious

^a Prince Edward Island Assem. see Can. Sess. Pap. 1882, No. 141, Jour. 1878, p. 2, and Appx. A. And p. 164.

working under the new law—was arrived at by adopting a plan similar to that accomplished in New Brunswick, already noticed, *ante*, p. 462.

Another difficulty regarding denominational schools occurred in Manitoba in the year 1890. It may be stated that the conditions under which this province entered into the federal union were altogether dissimilar from those of the old established colonies. Prior to 1870, the Hudson Bay Company exercised plenary control over the whole of the north-western territories. What was known as the Red River settlement comprised a number of settlers and half-breeds. The former had petitioned the Imperial government for a union with the dominion of Canada, with the object of obtaining a settled government, and escaping from the arbitrary and vexatious rule of the Hudson Bay Company's officials. The Metis, on the contrary, viewed the further influx of settlers as likely to destroy their independence, and consign their race, creed, and language to the control of the new-comers, and the newly-appointed governor sent by the Canadian government was refused admission to the recently constituted territory. It was with much difficulty that order was fully established, and that the peaceful acceptance of the union act of 1870 was brought into operation.

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The twenty-second section of this act of union reads as follows : In and for the province, the said legislature (of Manitoba) may exclusively make laws in relation to education, subject and according to the following provisions :—

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools, which any class of persons have by law or *practice* in the province at the time of the union.

(2) An appeal shall lie to the governor-general in council from any act or decision of the legislature of the province, or of any provincial authority, affecting any right or privilege of the protestant or Roman catholic minority of the Queen's subjects in relation to education.

(3) In case any such provincial law as from time to time seems to the governor-general in council requisite for the due execution of the provisions of this section is not made, or in case any decision of the governor-general in council, or any appeal under this section is not duly executed by the proper provincial authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the governor-general under this section.

At the time of the union the protestants and catholics were

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about even in numbers, and during the first session of the newly-created legislative assembly (1871) an 'Act to establish a system of education in the province' was passed. By this act the privileges of Roman catholics in schools was recognised and confirmed. The lieutenant-governor in council was empowered to appoint not less than ten nor more than fourteen persons to be a board of education for the province, of whom one-half were to be protestants and the other half catholics, with one superintendent of protestant and one of catholic schools. The board was divided into two sections, protestant and catholic, each section having under its control and management the discipline of the schools of its faith, and prescribing the books to be used in the schools under its care which had reference to religion or morals. The moneys appropriated for education by the legislature were likewise divided equally between the two sections.

The protestant population having in the meanwhile increased another act was passed in 1875, whereby the board of education was increased to twenty-one, twelve protestants and nine Roman catholics; the moneys voted by the legislature were to be divided between the protestant and catholic schools in proportion to the number of children of school age in the schools under the care of protestant and catholic sections of the board respectively. It was further provided, in 1881, that the establishment in a school district of a school of one denomination should not prevent the establishment of a school of another denomination in the same district.

This system appeared to work satisfactorily during a period of nineteen years, when the denominational system was brought to an abrupt termination.

In the session of the Manitoba legislature, 1890, two acts were passed in respect of education. The first one, c. 37, abolishes the board of education heretofore existing, and the office of superintendent of education, and creates a department of education which is to consist of the executive council or a committee thereof, appointed by the lieutenant-governor in council, and also an advisory board composed of seven members, four of whom are to be appointed by the department of education, two by the teachers of the province and one by the university council. Among the duties of the advisory board is the power 'to examine and authorise text books, and books of reference for the use of the pupils and school libraries; to determine the qualifications of teachers and inspectors for high and public schools; to appoint examiners for the purpose of preparing examination papers; to prescribe the form of religious exercises to be used in public schools.'

The next act is the public schools act, c. 38. It repeals all former statutes relating to education. It enacts, amongst other

things, as follows : Section 3, 'All protestant and catholic school districts, together with all elections and appointments to office, all agreements, contracts, assessment and rate bills heretofore duly made in relation to protestant or catholic schools, and existing when this act comes into force, shall be subject to the provisions of this act.' Section 4, 'The term for which each school trustee holds office at the time this act takes effect shall continue as if such term had been created by virtue of an election under this act.' Section 5, 'All public schools shall be free schools, and every person in rural municipalities between the age of five and sixteen years, and in cities, towns, and villages between the age of six and sixteen, shall have the right to attend some school.' Section 6, 'Religious exercises in the public schools shall be conducted according to the regulations of the advisory board. The time for such religious exercises shall be just before the closing hour in the afternoon. In case the parent or guardian of any pupil notifies the teacher that he does not wish such pupil to attend such religious exercises, then such pupil shall be dismissed before such religious exercises take place.' Section 7, 'Religious exercises shall be held in a public school entirely at the option of the school trustees for the district, and, upon receiving written authority from the trustees, it shall be the duty of the teacher to hold such religious exercises.' Section 8, 'The public schools shall be entirely non-sectarian, and no religious exercises shall be allowed therein except as above provided.' Section 92 enacts that 'the municipal council of every city, town, and village shall levy and collect upon the taxable property within the municipality in the manner provided in this act, and in the municipal and assessment acts, such sum as may be required by the public school trustees for school purposes.' Section 108, which provides for the legislative grant to schools, has the following sub-section : '(3) Any school not conducted according to all the provisions of this, or any act in force for the time being, or the regulations of the department of education, or the advisory board, shall not be deemed a public school within the meaning of the law, and shall not participate in the legislative grant.' By section 143, 'No teacher shall use, or permit to be used, as text-books, any books in a model or public school except such as are authorised by the advisory board, and no portion of the legislative grant shall be paid to any school in which unauthorised books are used.' By section 179, 'In cases where, before the coming into force of this act, catholic school districts have been established, as in the next preceding section mentioned (that is, covering the same territory as any protestant district), such catholic school district shall, upon the coming into force of this act, cease to exist, and all the assets

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of such catholic school district shall belong to, and all the liabilities thereof be paid by, the public school district.'

These acts were strenuously opposed in the legislative assembly of Manitoba by the supporters of the denominational system, who claimed that the words 'or practice' in the first sub-section of section 22 of the Manitoba act were designedly introduced to protect the rights of any minority in the province which might wish to retain their schools in the same position as they were prior to and at the time of the union. Petitions, supported by affidavits describing the school system at the time of the union, and for nineteen years subsequent thereto, were forwarded to the governor-general in council, praying for the disallowance of the obnoxious acts. The federal government declined to adopt this course, considering 'that these questions required the decision of the judicial tribunals, more especially as an investigation of facts was necessary to their determination.' And the minister of justice states in his report to the governor-general in council on the two education acts above referred to, that if they be sustained by the courts 'the time will come for your excellency to consider the petitions which have been presented by and on behalf of the Roman catholics of Manitoba for redress under sub-sections (2) and (3) of section 22 of the 'Manitoba act,' which it is contended are analogous to the provisions made by the 'British North America act,' in relation to the other provinces. These sub-sections contain in effect the provisions which have been made as to all the provinces, and are obviously those under which the constitution intended that the government of the dominion should proceed if it should at any time become necessary that the federal powers should be resorted to for the protection of a protestant or Roman catholic minority against any act or decision of the legislature of the province, or of any provincial authority, affecting any 'right or privilege' of any such minority 'in relation to education.'

^b

The question of the validity of the education acts was brought by a Roman catholic ratepayer of the city of Winnipeg, named Barrett, who made an application in the court of Queen's bench to quash two assessment by-laws of the city passed in pursuance of the public schools act, on the ground that 'by the said by-laws the amounts to be levied for school purposes for the protestant and catholic schools are united, and one rate levied upon protestants and Roman catholics alike for the whole sum.'

The judge before whom the case was argued in the first instance,

^b Report of a Committee of the Privy Council, Can. Sess. Pap. 1893, No. 33, p. 14.

and subsequently the full court, with one dissentient, held that (1) The public schools act was *intra vires* of the legislature of Manitoba. (2) That the parliament of Canada intended, by inserting the words 'or practice' in the Manitoba act, that whatever any class of persons were at the time of the union, with the assent of, or at least without objection from, the other members of the community, in the habit or custom of doing in reference to denominational schools, should continue, and should not be affected by provincial legislation. (3) That any right or privilege which the Roman Catholics had at the time of the union, with respect to denominational schools, was not taken away or affected by the act, and can be exercised as fully now as before the act. (4) That the schools established by the public schools act were not denominational schools, but in the strictest sense public non-sectarian schools.'^c

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question.

An appeal was taken from this decision to the supreme court of Canada, where the judgment of the Manitoba court was unanimously reversed. But on subsequent appeal to her Majesty's privy council, the judgment of the supreme court was reversed and the judgment of the Manitoba court sustained. To avoid useless repetitions, and at the same time to give full weight to the arguments advanced on both sides of this important case, the judgment of the supreme court and that of the lords of the privy council is given almost *in extenso*.

Sir W. J. Ritchie, the late chief justice of the supreme court of Canada, in delivering judgment laid stress, in his opening remarks, on the assumption that the dominion parliament, when granting a constitution to Manitoba, must have been fully alive to the importance of the school question in all its bearings, and had its attention especially directed to that which pertained to the educational institutions in Manitoba, more particularly by the Catholic church, as testified by Archbishop Taché. He then proceeds:—

Supreme
court
judgment.

'The British North America act confers on the local legislature the exclusive power to make laws in relation to education, provided nothing in such laws shall prejudicially affect any right or privilege, with respect to denominational schools, which any class of persons had by law in the province at the union, but the Manitoba act goes much further, and declares that nothing in such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons had by law or practice in the province at the union. We are now practically asked to reject the words "or practice" and construe the statute as if they had not been used, and to read this restrictive clause out of the statute as being inapplicable to the existing state of things in Manitoba at the union; whereas, on the contrary, I

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think by the insertion of the words "or practice" it was made practically applicable to the condition at the time of the educational institutions, which were, unquestionably and solely as the evidence shows, of a denominational character. It is clear that at the time of the passing of the Manitoba act no class of persons had by law any rights or privileges secured to them; so if we reject the words "or practice" as meaningless or inoperative, we shall be practically expunging the whole of the restrictive clause from the statute. I know of no rule of construction to justify such a proceeding, unless the clause is wholly unintelligible or incapable of any reasonable construction. The words used, in my opinion, are of no doubtful import, but are, on the contrary, plain, certain, and unambiguous, and must be read in their ordinary grammatical sense.

'While it is quite clear that at the time of the passing of this act there were no denominational or other schools established and recognised by law, it is equally clear that there were at that time in actual operation or practice a system of denominational schools in Manitoba well-established, and the *de facto* rights and privileges of which were enjoyed by a large class of persons. What then was there more reasonable than that the legislature should protect and preserve to such class of persons those rights and privileges they enjoyed in practice, though not theretofore secured to them by law, but which the dominion parliament appears to have deemed it just should not, after the coming into operation of the new provincial constitution, be prejudicially affected by the local legislature?

'I quite agree with the cases cited by the learned chief justice of Manitoba as to the rules by which the act should be construed. I agree that the court must look not only at the words of the statute but at the cause of making it, to ascertain the intent. When we find the parliament of Canada altering and adding to the language of the British North America act by inserting a limitation not in the British North America act, must we not conclude that it was done advisedly? What absurdity, inconsistency, injustice or contradiction is there in giving the words "or practice" a literal construction, more especially, as I have endeavoured to show, as the literal meaning is the only meaning the words are capable of, and is entirely consistent with the manifest intention of the legislature, namely, to meet the exigencies of the country, and cover denominational schools of the class practically in use and operation? If the literal meaning is not to prevail I have yet to hear what other meaning is to be attached to the words "or practice." If the legislature intended to protect the classes of persons who had founded and were carrying on denominational schools of the character of those which existed at the time of the passing of the act, I am at a loss to know what other words they

could more aptly have used. They might, it is true, have said "which any class of persons have by law or usage," but the words "practice" and "usage" are synonymous. I agree also that we should ascertain what the language of the legislature means, in other words, to suppose that parliament meant what parliament has clearly said.

'It cannot be said that the words used do not harmonise with the subject of the enactment, and the object which I think the legislature had in view. If the legislature intended to recognise denominational schools how could they have used more expressive words to indicate their intention, since the words used, read in their ordinary grammatical sense, admit of but one meaning and therefore one construction? And we should not speculate on the intention of the legislature, that intention being clearly indicated by the language used in view of the condition of, and the state of education in that country. The object the legislature must have had in view in using them was clearly to protect the rights and privileges, with respect to denominational schools, which any class or persons had by law or practice, that is to say, had by usage at the time of the union. I cannot read the language of the act in any other sense.

'The decision of the court of New Brunswick in the case of *ex parte Renaud*,^d referred to in the court below, has no application in this case. That case turned entirely on the fact that the parish school of New Brunswick, 21 Vic. c. 9, conferred no legal rights on any class of persons with respect to denominational schools. It was there simply determined that there were no legal rights with respect to denominational schools, and therefore no rights protected by the British North America act, a very different case from that we are now called on to determine. It may very well be that in view of the wording of the British North America act and the peculiar state of educational matters in Manitoba, the dominion parliament determined to enlarge the scope of the British North America act, and protect not only denominational schools established by law, but those existing in practice, for as I am reported to have said, and no doubt did say, in *ex parte Renaud*, that in that case "we must look to the law as it was at the time of the union, and by that and that alone be governed."

'Now, on the other hand, in this case we must look to the practice with reference to the denominational schools as it existed at the time of the passing of the Manitoba act.

'That this was the view taken by the legislature of Manitoba would seem to be indicated by the legislation of that province up to the passing of the public schools act, which very clearly recognised

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^d 1 Pugs. (N. B.) 273.

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—
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denominational schools, and made provision for their maintenance and support, providing that support for protestant schools should be taxed on protestants, and for catholic schools should be taxed on catholics, and conferring the management and control of protestant schools on protestants, and the like management and control of catholic schools on catholics. This denominational system was most effectually wiped out by the public schools act, and not a vestige of the denominational character left in the school system of Manitoba.

‘The only question, it strikes me, we are now called upon to consider is, Does this public schools act prejudicially affect the class of persons who, in practice, enjoyed the rights and privileges of denominational schools at the time of the union? Now, what were the provisions of the public schools act?’ [His lordship here read a synopsis of the act by Judge Dubuc, of the Manitoba bench.]^e

‘But it is said that the catholics, as a class, are not prejudicially affected by this act. Does it not prejudicially, that is to say injuriously—disadvantageously, which is the meaning of the word “prejudicially”—affect them when they are taxed to support schools of the benefit of which, by their religious belief and the rules and principles of their church, they cannot conscientiously avail themselves, and at the same time by compelling them to find means to support schools to which they can conscientiously send their children, or in the event of their not being able to find sufficient means to do both, to be compelled to allow their children to go without either religious or secular instruction? In other words, I think the catholics were directly prejudicially affected by such legislation, but whether directly or indirectly the local legislature was powerless to affect them prejudicially in the matter of denominational schools, which they certainly did by practically depriving them of their denominational schools, and compelling them to support schools the benefit of which protestants alone can enjoy.

‘In my opinion the public schools act is *ultra vires*, and the by-laws of the city of Winnipeg, Nos. 480 and 483, should be quashed, and this appeal allowed with costs.’

Privy
council
judgment.

At a meeting of the judicial committee of the privy council, on Saturday, July 30, 1892, Lord Macnaghten, on behalf of the committee, delivered the following judgment, *re* The City of Winnipeg *v.* Barrett : The City of Winnipeg *v.* Logan.

‘The controversy which has given rise to the present litigation is, no doubt, beset with difficulties. The result of the controversy is of serious moment to the province of Manitoba, and a matter apparently of deep interest throughout the dominion. But in its legal aspect

^e See *ante*, p. 466.

the question lies in a very narrow compass. The duty of this board is simply to determine, as a matter of law, whether according to the true construction of the Manitoba act of 1870, having regard to the state of things which existed in Manitoba at the time of the union, the provincial legislature has, or has not, exceeded its powers in passing the public schools act, 1890.

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question.
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council
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‘Manitoba became one of the provinces of the dominion of Canada under the Manitoba act, 1870, which was afterwards confirmed by an Imperial statute known as the British North America act, 1871. Before the union it was not an independent province with a constitution and a legislature of its own. It formed part of the vast territory which belonged to the Hudson’s Bay Company, and was administered by their officers or agents.’

[The judgment proceeds to examine section twenty-two and the sub-sections of the act of union.]

‘At the commencement of the argument a doubt was suggested as to the competency of the present appeal, in consequence of the so-called appeal to the governor-general in council provided by the act. But their lordships are satisfied that the provisions of sub-sections two and three do not operate to withdraw such a question as that involved in the present case from the jurisdiction of the ordinary tribunals of the country.

‘Sub-sections one, two, three, of section twenty-two of the Manitoba act, 1870, differ but slightly from the corresponding sub-sections of section ninety-three of the British North America act, 1867. The only important difference is that in the Manitoba act, in sub-section one, the words “by law” are followed by the words “or practice,” which do not occur in the corresponding passage in the British North America act, 1867. These words were no doubt introduced to meet the special case of a country which had not as yet enjoyed the security of law properly so-called. It is not perhaps very easy to define precisely the meaning of such an expression, “having a right or privilege by practice.” But the object of the enactment is tolerably clear; evidently the word “practice” is not to be construed as equivalent to “custom having the force of law.” Their lordships are convinced that it must have been the intention of the legislature to preserve their legal right or privilege, and every benefit or advantage in the nature of a right or privilege with respect to denominational schools which any class of persons practically enjoyed at the time of the union.

‘What then was the state of things when Manitoba was admitted to the union? On this point there is no dispute. It is agreed that there was no law, or regulation, or ordinance with respect to education in force at the time. There were therefore no right or privileges

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—
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council
judgment.

with respect to denominational schools existing by law. The practice which prevailed in Manitoba before the union is also a matter on which all parties are agreed. The statement on the subject by Archbishop Taché, who has given evidence in Barrett's case, has been accepted as accurate and complete.

'Now, if the state of things existing before the union had been a system established by law, what would have been the rights and privileges of the Roman catholics with respect to denominational schools? They would have by law the right to establish schools at their own expense, to maintain their schools by school fees or voluntary contributions, and to conduct them in accordance with their own religious tenets. . . . Possibly the right, if it had been defined or recognised by positive enactments, might have had attached to it as a necessary or appropriate incident the right of exemption from any contribution under any circumstances to schools of a different denomination.

'But in their lordships' opinion it would be going much too far to hold that the establishment of a national system of education upon a non-sectarian basis is so inconsistent with the right to set up and maintain denominational schools that the two things cannot exist together, or that the existence of the one necessarily implies or involves immunity from taxation for the purpose of the other.

'It has been objected that if the rights of the Roman catholics and of other religious bodies in respect of their denominational schools are to be so strictly measured and limited by the practice which actually prevailed at the time of the union, they will be reduced to the condition of a "natural right" which "does not want any legislation" to protect it. Such a right it was said cannot be called a privilege in any proper sense of the word. If that be so, the only result is that the protection which the act purports to afford to rights and privileges existing by "practice" has no more operation than the protection which it purports to afford to rights and privileges existing "by law."

'It can hardly be contended that in order to give a substantial operation and effect to a saving clause expressed in general terms, it is incumbent upon the court to discover privileges which are not apparent of themselves, or to ascribe distinctive and peculiar features to rights which seem to be of such a common type as not to deserve special notice or require special protection.'

The judgment then passes in review the various enactments passed by the Manitoba legislature from 1871 to 1890, and proceeds: 'Such being the main provisions of the public schools act, their lordships have to determine whether that act prejudicially affects any right or privilege with respect to denominational schools

which any class of persons had by law or practice in the province at the union.

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school
question.

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council
judgment.

‘Notwithstanding the public schools act, 1890, Roman catholics and members of every other religious body in Manitoba are free to establish schools throughout the province ; they are free to maintain their schools by school fees or voluntary subscriptions ; they are free to conduct their schools according to their own religious tenets, without molestation or interference. No school child is compelled to attend a public school. No special advantage other than the advantage of a free education in schools conducted under public management is held out to those who do attend. But then it is said that it is impossible for Roman catholics, or for members of the Church of England (if their views are correctly represented by the Bishop of Rupert’s Land, who has given evidence in Logan’s case) to send their children to public schools where the education is not superintended and directed by the authorities of their church, and that therefore Roman catholics and members of the Church of England who are taxed for public schools, and at the same time feel themselves compelled to support their own schools, are in a less favourable position than those who can take advantage of the free education provided by the act of 1890. That may be so. But what right or privilege is violated or prejudicially affected by the law ? It is not the law that is in fault. It is owing to religious convictions, which everybody must respect, and to the teaching of their church, that Roman catholics and members of the Church of England find themselves unable to partake of advantages which the law offers to all alike.

‘Their lordships are sensible of the weight which must attach to the unanimous decision of the supreme court (of Canada). They have anxiously considered the able and elaborate judgments by which that decision has been supported. But they are unable to agree with the opinion which the learned judges of the supreme court have expressed as to the rights and privileges of Roman catholics in Manitoba at the time of the union. They doubt whether it is permissible to refer to the course of legislation between 1871 and 1890 as a means of throwing light on the previous practice, or on the construction of the saving clause in the Manitoba act. They cannot assent to the view which seems to be indicated by one of the members of the supreme court, that public schools under the act of 1890 are in reality protestant schools. The legislature has declared, in so many words, that “public schools shall be entirely non-sectarian,” and that principle is carried out throughout the act.

‘With the policy of the act of 1890 their lordships are not con-

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school
question.

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council
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cerned. But they cannot help observing that if the views of the respondents were to prevail, it would be extremely difficult for the provincial legislature, which has been entrusted with the exclusive power of making laws relating to education, to provide for the educational wants of the more sparsely inhabited districts of a country almost as large as Great Britain, and that the powers of the legislature, which on the face of the act appear so large, would be limited to the useful but somewhat humble office of making regulations for the sanitary conditions of school houses, imposing rates for the support of denominational schools, enforcing the compulsory attendance of scholars, and matters of that sort.

‘In the result, their lordships will humbly advise her Majesty that these appeals ought to be allowed with costs.’^f

The decision of the privy council sustaining the validity of the Manitoba school acts led the Roman catholic minority in the province of Manitoba to seek *remedial* legislation from the federal authorities.

In their petition to the governor-general they claimed that ‘the time has now come for your excellency to consider the petitions which have been presented by, and on behalf of, the Roman catholics of Manitoba for redress under sub-sections 2 and 3 of section 22 of the Manitoba act’^g (for full text of these sub-sections see *ante*, page 465).

In response to this appeal the dominion privy council invited Mr. Ewart, counsel for the petitioners, to appear and state the procedure which should be adopted, and the grounds upon which the intervention of his excellency in council was claimed.

On November 26 a sub-committee of council met to hear Mr. Ewart on behalf of the catholic minority, who urged that the 2nd and 3rd sub-sections of the 22nd section of the Manitoba act dealt with *intra vires* cases, where appeal is provided, and, when entertained, parliament may be called upon to pass remedial legislation. When a statute is *ultra vires* no appeal would lie, as there would be nothing to appeal from; only in the case of *intra vires* legislation can a remedy be provided. That under the 2nd sub-section of the 22nd section there is no limitation as to time or date of the existence of ‘any right or privilege of the protestant or catholic minority of the Queen’s subjects in relation to education.’ And only in the case of a right coming into force after the union being prejudiced by legislation would such be *intra vires*, as in the present case, and therefore open to appeal.

That there is no interference with provincial rights in seeking

^f L. R. Appeals, 1892, p. 465.

^g Canada Sess. Pap. 1893, No. 33, p. 14.

remedial measures because the province, under the Manitoba act, has but a limited power to legislate in reference to education ; and that any rights granted to the minority in this respect may not be removed by the local legislature without an appeal to the governor in council. Manitoba school question.

In conclusion he suggested, with reference to the form in which proceedings should be taken in the matter of appeal, that a day should be appointed by the privy council for hearing of argument on both sides of the question.

This course was adopted by the government, and January 21, 1893, fixed for hearing. Counsel for the minority petitioners appeared and argued their case, but the government of Manitoba declined to take part in the proceedings.

Subsequently the privy council decided to submit the legal points of the question to the supreme court of Canada for decision, that the important issues of law involved might be authoritatively settled before proceeding with a consideration of the appeal.

The case was accordingly referred to the supreme court in the following form, where it now (1893) awaits judicial investigation :—

‘1. Is the appeal referred to in the said memorials and petitions, and asserted thereby, such an appeal as is admissible by sub-section 3 of section 93 of “the British North America act, 1867,” or by sub-sections 2 and 3 of section 22 of “the Manitoba act,” 33 Vic. (1870) chap. 3 (Canada)?^h

‘2. Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the sub-sections above referred to ?

‘3. Does the decision of the judicial committee of the privy council in the cases of *Barrett v. The City of Winnipeg*, and *Logan v. The City of Winnipeg*, dispose of or conclude the application for redress based on the contention that the rights of the Roman catholic minority which accrued to them after the union under the statutes of the province have been interfered with by the two statutes of 1890, complained of in the said petitions and memorials ?

‘4. Does sub-section 3 of section 93 of “the British North America act, 1867,” apply to Manitoba ?ⁱ

^h For full text of sub-sections 2 and 3 of section 22 Manitoba act, see *ante*, p. 465.

ⁱ 3. Where in any province a system of separate or dissentient schools exists by law at the union or is thereafter established by the legislature of the province, an ap-

peal shall lie to the governor-general in council from any act or decision of any provincial authority affecting any right or privilege of the protestant or Roman catholic minority of the Queen's subjects in relation to education.

Manitoba
school
question.

'5. Has his excellency the governor-general in council power to make the remedial orders which are asked for in said memorials and petitions, assuming the material facts to be as stated therein ?

'6. Did the acts of Manitoba relating to education, passed prior to the session of 1890, confer on the minority a "right or privilege with respect to education" within the meaning of sub-section 2 of section 22 of "the Manitoba act," or establish a "system of separate or dissentient schools" within the meaning of sub-section 3 of section 93 of "the British North America act, 1867," if said section 93 be found to be applicable to Manitoba, and if so, did the two acts of 1890 complained of affect the right or privilege of the minority in such a manner as to warrant an appeal thereunder to the governor-general in council ?'

This complex question may be considered as one beyond the range of practical politics, and coming, in its present stage, more suitably within the domain of the courts than of parliament.

Having endeavoured to set forth the claims to remedial legislation of the catholic minority in Manitoba at the hands of the federal parliament, the subject will be properly concluded by stating the grounds held in opposition to such contentions ; they are briefly these :—

That the 22nd section of the Manitoba act is a complete substitution of the 3rd sub-section of the 93rd section of the B.N.A. act, and not supplementary to it.

That the rights possessed by law or practice under the 22nd section of the Manitoba act still subsist, and have in no way been prejudicially affected by the Manitoba school acts of 1890.

That there is no grievance upon which an appeal to the governor-general lies, and no ground to warrant the interference of the Canadian parliament.

It is not denied that there may be a right of appeal in matters *intra vires* of the local legislature, where the provisions for the administration of a right may be of such a character as to make the right inoperative ; but nothing of such a nature has been done in the Manitoba school acts, as the right to denominational schools still remains in precisely the same position—in the eye of the law—that they were in at the time Manitoba was admitted into the union.

The matter now rests with the supreme court to decide as to the legal merits of the case.

Prince
Edward
Island
land acts.

In Prince Edward Island, for upwards of half a century, the 'land question' had been a fruitful source of agitation. Bills to settle this question were repeatedly passed by the island legislature, on a basis which was deemed objectionable by the Imperial govern-

ment, and from which, accordingly, the assent of the Crown was withheld. Prince Edward Island land acts.

However, an act passed in 1873 on this subject, about which the colonial secretary was in doubt as to whether it had been passed before or after the union of the province with Canada, received royal assent.

In 1874, an act to amend the land act of 1873 was petitioned against; when the colonial secretary advised the dominion government to suggest to the local legislature the appointment of arbitrators to determine land claims.^k Accordingly, in 1875, an act was passed to erect a land court to arbitrate in the settlement of such questions, which received the assent of the governor-general. Petitioners memorialised the Queen to disallow this act, but in reply the colonial secretary declined to advise her Majesty to interfere.

The same question—as to the right of the Imperial government to interpose, whether by action or by advice, in the settlement of questions within the undoubted jurisdiction and competency of the provincial legislatures to determine—was raised in the case of two acts passed by the Ontario legislature in 1874, respecting the union of the presbyterian churches in that province, and in relation to the presbyterian college at Kingston, commonly called Queen's College.^l Ontario legislation on presbyterian questions. This case is likewise important, as contributing to determine the proper bounds of dominion and of provincial legislation on a question affecting local and civil rights in various provinces of the dominion.

Petitions addressed in the first instance to the governor-general, and afterwards to her Majesty's secretary of state—by the opponents of this ecclesiastical union—representing the serious and unprecedented infringement of rights, both spiritual and temporal, and the setting aside of a royal charter, passed under the great seal, proposed to be effected by these local acts, and praying that they might not receive the royal assent, were presented to the governor-general, and by him referred to the consideration of the minister of justice.

On November 23, 1875, upon the recommendation of the minis-

^k Com. Pap. 1875, v. 53, p. 746.

^l Ontario Stats. 1874 (38 Vic.), cc. 75, 76.

Ontario
presby-
terian act.

ter of justice, it was decided by the governor-general in council, in the case of one of the acts aforesaid (38 Vic. c. 75), that it should be left to its operation, inasmuch as it dealt with matters within the competency of the local legislature ; save only in respect to the seventh clause, which professed to deal with presbyterian colleges at Montreal and Quebec, and with certain funds which are outside of the province of Ontario. These provisions appeared to be *ultra vires* and inoperative, although the disallowance of the whole act could not be advised on this account.

By a further minute of the governor in council, dated March 6, 1876, upon a report from the minister of justice, it was decided that, while the petitions aforesaid and the papers in connection therewith might suitably be forwarded to the secretary of state for the colonies, as requested by the petitioners, yet it should be distinctly observed 'that, by the British North America act, the power of disallowance [of provincial acts] does not reside in the Imperial authorities ; that it can only be exercised [by the governor-general in council] within twelve months ; that that time has elapsed ; and that there is, consequently, no power to interfere with the operation of the acts in question, so far as they are within the powers of the local legislature, a question which can be raised in the courts alone.'

On March 13, 1876, the governor-general transmitted the petitions and papers aforesaid to the colonial secretary. In reply, the secretary of state requested that the memorialists might be informed that he concurred in the opinion expressed by the governor-general in council ; that the acts in question are now in full operation, and no appeal can be brought against them, unless upon the plea that the provincial legislature was incompetent to pass them—in which case, it would be open to test that question in a court of law.^m

By way of further protest against these Ontario statutes, a presbyterian minister, on May 9 1876, inclosed to the secretary of state for the colonies a pamphlet he had written to expose the injuries inflicted by these acts upon the presbyterian body in Canada, who desired to retain their connection with the church of Scotland, and earnestly besought for permission to appeal to her Majesty's privy council for redress. The colonial secretary simply transmitted a copy of this letter to the governor-general without comment.ⁿ

The complainants then availed themselves of the suggestion of the dominion government, and applied to the court of chancery in Ontario to decide upon the validity of the provincial act for the

^m Canada Sess. Pap. 1877, No. 89, pp. 435-447.

ⁿ *Ib.* p. 448.

union of the presbyterian churches. Judgment was rendered by the court, in exact accordance with the opinion pronounced upon the act by the dominion minister of justice. The validity of the act itself was confirmed, save only as respects so much of the seventh section as claimed to deal with institutions and property outside of the limits of Ontario. This portion of the act was declared to be *ultra vires*: but it was asserted that, by legislation in the province of Quebec, this defect could be remedied, which removed all ground of objection to the legality of the statute, and to the agreement between the churches based thereupon.^o

Ontario
presbyte-
rian acts.

In 1875, the necessary acts were passed by the Quebec legislature to give legal effect to the union of the presbyterian churches in Canada, and to carry out certain resolutions agreed upon in synod in reference to the temporalities of the denomination, so far as they were situated or invested in the province of Quebec.^p It was contended, however, by the opponents in this case, that inasmuch as the presbyterian church was a body which existed in the various provinces of Canada, the required privileges could only be conferred by dominion legislation. Chief Justice Dorion, however, in a judgment delivered in the court of appeal in June 1880, confirming a judgment given by the superior court, Montreal, declared that this question, being one affecting property and civil rights of a corporation within the province of Quebec, these statutes were within the scope of the legislative authority of the provincial legislature; that the dominion parliament had no right to interfere, and that the relief required was properly obtainable on application to the several local legislatures in Canada, by whom alone it could be legally granted. Two judges dissented from these conclusions, but the majority of the court agreed with Chief Justice Dorion.^q

On January 21, 1882, the judicial committee of the privy council decided—on an appeal from the court of Queen's bench, Montreal, in the case of *Dobie v. The Board of Temporalities of the Presbyterian Church in Canada*—that the Quebec act of 1875 (and by consequence the Ontario act of 1874) which professed to repeal and amend the Canada act of 1858, for the incorporation of the said temporalities board, was *ultra vires*. A majority of the court of Queen's bench in Montreal were, in fact, of the same opinion. But, owing to one of the judges waiving this objection and agreeing with two of his brethren on other grounds, the decision of that

^o *Cowan v. Wright, Grant's* Chan. Rep. v. 23, p. 616.

^p Quebec Stat. 38 Vic. cc. 62 & 64.

^q *Dobie v. Presbyterian Tem-*

poralities Fund Board. This case is fully reported in *Doutre, Const. of Canada*, pp. 247-265. On Sep. 17, 1880, an appeal to Privy Council was allowed.

Ontario
presbyte-
rian acts.

court had been adverse to the appellant. The judicial committee, however, reversed their judgment. They held that legislation on this question appertained to the dominion parliament, not to the provincial legislatures. Those legislatures could not create a corporation which should exist in and for two or more provinces of Canada, neither could they destroy it. Under the British North America act of 1867, their powers to repeal or amend the statutes of the old parliament of Canada are precisely co-extensive with the powers of direct legislation with which they are now invested. They might, indeed, deal directly with property, or contracts affecting property, within their province ; but not with the constitution, civil rights, or privileges of a corporation which exists equally in different provinces. Neither was it competent by joint and harmonious action in two or more legislatures to alter or repeal the act of 1858, because the power of these legislatures to destroy a law is measured by their power to reconstruct ; and if they were allowed jointly to abolish the board of 1858, which was a corporation in and for the provinces of Quebec and Ontario, they could only create in its stead two corporations, each having a standing independent of the other. The dominion parliament is therefore the only legislature having power to modify or repeal the provisions of the act of 1858.^r Pursuant to this decision, the dominion parliament in 1882 passed acts respecting Queen's College at Kingston, Ontario, and respecting the administration of the temporalities fund of the presbyterian church in Canada.^s

The dominion parliament is empowered under B.N.A. act to extend the powers of a railway or other corporation, which had been chartered by provincial legislation, and by declaring it to be a work for the general advantages of Canada, to give it a right of operation in two or more provinces.^t

The Quebec, Montreal, Ottawa and Occidental railway affords a curious example of a corporation first created under a provincial act ; then by dominion legislation afterwards converted into an undertaking under dominion control (pursuant to B.N.A. act, sec. 92, subs. 10 ; see also consolidated railway act of Canada, 1883), and subsequently again transferred to provincial control. But, in

^r L. C. Jurist, v. 26, p. 170 ; L. T. Rep. N.S. v. 46, p. 1.

^s Can. Stat. 45 Vic. c. 124. In Jan. 1883, the court of Q. Bench of Montreal held that the aforesaid statute, being retroactive in its intent, was sufficient to sustain an action by the Board of Temporalities,

notwithstanding that the Privy Council had declared that Board to have been illegally constituted. Legal News, v. 6, p. 27.

^t See Montreal Northern Colonisation Railway, Can. Stat. 36 Vic. c. 82.

order to validate the latter change, the privy council decided that further dominion legislation was necessary.^u

In July, 1878, Isaac Butt, Esq., M.P., forwarded to the secretary of state for the colonies (Sir M. E. Hicks-Beach), for presentation to her Majesty, a petition from twenty-five thousand Irish-Canadian catholics, residing in the province of Ontario, complaining that an act giving special privileges to the Orange society in the province of New Brunswick had received from the lieutenant-governor of that province the royal assent, and praying that her Majesty would be pleased to forbid the governor-general of the dominion, and the lieutenant-governors therein, to sanction by the royal assent any enactment giving a charter to the Orange society. In reply, Mr. Butt was informed that, in accordance with the standing rules of the colonial service, all communications from the colonies should be transmitted to the colonial office through the governor of the colony from whence they proceed, in order that they may be duly verified and reported upon by the responsible authorities; that, therefore, the petition accompanying his letter would at once be forwarded to the governor-general of Canada, for the information of the dominion and provincial authorities; 'but, in the mean time, I am to intimate that the question to which it relates would appear, under the provisions of the British North America act, 1867, to fall within the exclusive powers of the provincial legislatures of the dominion, and that it is contrary to established constitutional procedure for her Majesty's government to interfere, unless in very special circumstances, with such legislation as is within the competency of a provincial legislature.'

Orange
society
in New
Brunswick.

On Aug. 2, 1878, copies of the foregoing correspondence were transmitted by the colonial secretary to the governor-general of Canada, with a request for 'such observations as the dominion and provincial authorities may think proper to make in the matter.'^v

[The opinion entertained by the Imperial government upon the abstract question of the propriety of granting special privileges to Orange societies in British North America, may be inferred from a despatch from the colonial secretary (the Duke of Newcastle) to Lieutenant-Governor Dundas, of Prince Edward Island, dated Sept. 21, 1863, intimating that he had felt it impossible to advise her Majesty to assent to a bill, passed by the island legislature, with a suspending clause 'to incorporate the grand Orange lodge of Prince Edward Island, and the subordinate lodges in connection therewith.' His grace expresses his 'deep regret that the legislature should have given its sanction to a class of institutions which all experience has

^u See *post*, p. 560.

^v Com. Pap. 1878, v. 55, p. 433.

shown to be calculated (if not actually intended) to embitter religious and political differences, and which thus must be detrimental to the best interests of any colony in which they exist.'^w A similar act of incorporation was subsequently passed by the island legislature, in 1878. It was reserved by the lieutenant-governor, but no action was taken by the dominion government for the reason given in regard to the Orange bills in Ontario.^x]

Orange
societies
in Canada.

But, inasmuch as the opinion of the dominion minister of justice had been already expressed^y (in the case of the Orange society bill, passed by the Ontario legislature in 1873) that it was within the competency of provincial legislatures to decide according to their own discretion whether or not they would confer special privileges upon such associations, the department of justice, in 1879, addressed a circular to the several provincial governments, intimating that they must severally determine upon their own responsibility how they would deal with the question of Orange society incorporations.

Orange
society
incorporated.

But in the session of 1890 the Orange association was incorporated by the dominion parliament^z embodying in its constitution a scheme of insurance, which required that it should possess a federal charter to carry on its operations.

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Estate
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Another measure that was the subject of much controversy, and caused considerable agitation throughout the country, was that of the Jesuit Estate Act.

By this act, passed in the Quebec legislature in 1888, c. 13, entitled 'An act respecting the settlement of the Jesuits' estates,' the provincial government made compensation to the Jesuits in lieu of all lands held by them in that province prior to the conquest of Canada; but which had, subsequent to that date, been confiscated by the Crown.

The preamble to the act sets forth in the form of correspondence:—

(1) The claims of the Jesuits for reasonable compensation as settlement of the question of ownership of property, to which, from 1799 to 1878, they had at different times made formal representation of title to the authorities.

(2) Request of the Quebec government to the Pope for permission to

^w Com. Pap. 1864, v. 40, p. 708.

^y Ontario Sess. Pap. 1st sess.

^x See Can. Sess. Pap. 1882, No. 1874, No. 19.
141, pp. 20, 161, 174.

^z 35 Vic. c. 105.

sell the property in question, pending settlement, together with the Pope's sanction thereto, provided that proceeds of sale should be made a special deposit to be disposed of hereafter with the sanction of the holy see.

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(3) Appointment by the hierarchy of their channels of negotiation with the government, together with the terms of settlement finally agreed upon.

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Under the second section of the act the lieutenant-governor in council is authorised to pay, out of any public money at his disposal, the sum of 400,000 dols. in the manner and under the conditions settled in the preamble. Under the fourth section authority is given to pay the sum of 60,000 dols. to the protestant committee of the council of public instruction according to conditions prescribed.

This act, together with the others passed by the provincial legislature in the same session, was left to its operation, after having been considered and reported upon in the usual formal manner by the minister of justice for the dominion.^a In the meantime a feeling hostile to the measure had been aroused amongst a large section of the protestant community in the country, and strong protests in the form of memorials and petitions, from religious and other institutions, were sent in to the governor-general against the act being permitted to become law.^b

In reply, the minister of justice reported to his excellency in council that the memorials had not convinced him that his recommendation for allowance of the act should be changed, and 'that the subject-matter of the act is one of provincial concern only, having relation to a fiscal matter entirely within the control of the legislature of Quebec.'^c

The question was then brought before parliament, when, on March 26, 1889, the following motion, as an amendment to motion for house in committee of supply, was put by a member of the lower house:—^d

That an humble address be presented to his Excellency the Governor-general setting forth:—

1. That this house regards the power of disallowing the acts of the legislative assemblies of the provinces, vested in his excellency in council, as a prerogative essential to the national existence of the dominion.

2. That this great power, while it should never be wantonly exercised, should be fearlessly used for the protection of the rights of a minority, for the preservation of the fundamental principles of the constitution, and for safeguarding the general interests of the people.

3. That, in the opinion of this house, the passage by the legislature of the province of Quebec of the act intituled 'An act respecting the settle-

^a Com. Pap. Canada, 1889, No. 54, p. 23.

^b *Ib.* p. 24.

^c *Ib.*

^d Mr. W. E. O'Brien. For his speech, see Canadian Hansard, 1889, pp. 812-816.

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ment of the Jesuits' estates,' is beyond the power of that legislature. Firstly, because it endows from public funds a religious organisation, thereby violating the undoubted constitutional principle of the complete separation of church and state, and of the absolute equality of all denominations before the law. Secondly, because it recognises the usurpation of a right by a foreign authority, namely, his holiness the Pope of Rome, to claim that his consent was necessary to empower the provincial legislature to dispose of a portion of the public domain, and also, because the act is made to depend upon the will, and the appropriation of the grant thereby made is subject to the control of the same authority. And, thirdly, because the endowment of the society of Jesus, an alien, secret, and politico-religious body, the expulsion of which from every Christian community wherein it has had a footing has been rendered necessary by its intolerant and mischievous intermeddling with the functions of civil government, is fraught with danger to the civil and religious liberties of the people of Canada.

And this house therefore prays that his Excellency will be graciously pleased to disallow the said act.*

The mover urged in addition to the reasons contained in the resolutions for disallowing the act, that, though the properties in question had been secured to the Jesuits by the act of capitulation, yet by the treaty of Paris this reservation was not carried out towards the society, as had been done in the case of other religious bodies; therefore the estates had passed into the hands of the Crown. That the question of title was settled by (1) the instructions given to Sir Guy Carleton, governor-general in 1775 :—

That the society be suppressed and dissolved, and no longer continued as a body corporate or politic, and all their rights, possessions, and property shall be vested in us for such purposes as we may hereafter think fit to direct or appropriate.^f

(2) A statement given by the attorney and assistant attorney-general of Lower Canada :—

The nature of their institution prevented them, individually, from taking anything under the capitulation of all Canada, and to their society under one head and domiciled at Rome, nothing was granted or could be legally or reasonably be supposed to be conveyed, but even that head, and with it the whole society, wheresoever dispersed, was finally dissolved and suppressed in 1773, so that the existence of the very few members of the order in this province can in no shape be construed as forming a body, corporate or politic, capable of any of the powers inherent and enjoyed by communities. . . . As a derelict or vacant estate, his Majesty became vested in it by the clearest of titles, if the right of conquest alone was not

* Jour. H. of Commons, Canada, 1889, p. 199.

^f Canadian Hansard, 1889, p. 813.

sufficient; but even upon the footing of the proceedings in France and the judicial acts of the sovereign tribunals of that country, the estates in this province would naturally fall to his Majesty and be subjected to his unlimited disposal, for, by those decisions it was established, upon good, legal, and constitutional grounds, that from the nature of the first establishment, or admission, of the society into France, being conditional, temporary, and probational, they would, at all times, be liable to expulsion, and having never complied with, but rejected the terms of their admission, they were not even entitled to the name of a society; wherefore, and by reason of the abuses and destructive principles of their institution they were stripped of their property and possessions.⁵

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(3) The decision of the judge advocate-general, Sir James Marriot, to whom was referred, in 1865, the question of title to these estates:—

That the order never had in France any legal establishment as part of the civil and ecclesiastical constitution of the realm, having refused the conditions on which it was admitted, because those terms were radically subvertive of the whole order. Their title, therefore, to estates in Canada had no better qualification than those titles had by the laws and constitution of the realm of France previous to the conquest. This society differed from other societies in that it had nowhere any corporate existence. All its property was vested in its General living at Rome, who was neither a French nor a British subject, and could not be either; and, therefore, could not avail himself of the fourth article of the treaty, being neither an inhabitant of Canada nor a subject of the king of France.

Though the Crown did not take possession of the properties till 1800, when the last survivor of the order in Canada died, they were subsequently handed over to the province of Quebec for educational purposes. The province in 1831 accepted by legislation this trust, and it was re-affirmed by the united parliament of Canada, in 1856; therefore the disposition of it for any other purpose would constitute a breach of contract and of trust. The fund having been specially set apart for higher educational purposes, Ontario, and the dominion as well under section 93 of the British North America act, shared in its interest. The speaker also took exception to the terms of the act, soliciting the sanction of the Pope to the disposal of the property, maintaining that appeal to his holiness was contrary to the spirit of the act of supremacy, and it was not in accordance with the religious liberty granted under the Quebec act to allow appeals to the Pope or to recognise his jurisdiction in matters pertaining to the province; that the act was therefore unconstitutional, as its validity depended on foreign jurisdiction. In conclusion, he contended 'that the endowment of the society of Jesus, an alien, secret,

⁵ Canadian Hansard, 1889, p. 813.

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and politico-religious body, is fraught with danger to the civil and religious liberties of the people of Canada.'

In support of the motion, it was argued by another member of the house^b that in its consideration the question presented itself in a twofold aspect, the one resting upon legal constitutional principles, and the other on a matter of public policy, rather than of law. He took exception, as he put it, to the startling recital in a British act of parliament, of a premier of a province asking permission of his holiness if there was any serious objection in the way of the government selling a property which was recognised as a portion of the public domain, thereby making the legislation of the province dependent on the act of the supreme pontiff of Rome, who, as a temporal power, had no authority to interfere. The act under consideration in effect did away with the purposes for which the Jesuit estates were appropriated, by putting into the general fund an amount which was granted for educational purposes, thus misappropriating—not using the term in its technical sense, recognising the right of the province to use the fund—this fund by providing that \$400,000 may be paid thereout to a certain institution. He did not accept the theory that the Jesuits held their estates in trust for educational purposes, the deeds showing that they were given in fee simple for all time. The decree of the parliament of Paris having in 1762 suppressed the Jesuit order, taking from them their lands, it was not strictly accurate to affirm that at the time of the definitive treaty of 1763 the Jesuit fathers held their estates. But for the sake of argument, if they did, the issue of the king's proclamation in October of that year introduced the laws of Great Britain into this country, which remained in force till the passing of the Quebec act in 1774; by the laws of England^c at the time the Jesuits were not tolerated, therefore the moment the British laws were introduced into this country, *ipso facto*, the Jesuits' estates became forfeited.^d That if there ever was a title to an estate or property made clear and recognised by legislation, it was that of the Jesuit estate, as set forth by the following enactments:—

In 1832 (Lower Canada), 2 Wm. 4, ch. 41, sec. 1.

That all monies arising out of the estates of the late order of Jesuits which now are in, or may hereafter come in the hands of the receiver-general, shall be applied to the purposes of education exclusively.

^b Mr. Dalton McCarthy, Q.C. For his speech see Canadian Hansard, 1889, pp. 842-854.

^d Vide Mr. McCarthy's speech. For extracts from instructions to

Governors Murray and Carleton, and opinions from Sir James Marriott and Mr. Wedderburn on this point, Canadian Hansard, 1889, pp. 844, 845.

In 1846, 9 Vic. ch. 59 :—

That the revenue and interests arising from the real or funded property forming part of the estates of the late order of the Jesuits, and now at the disposal of the legislature for educational purposes in Lower Canada, shall be, and are hereby declared to be applicable to such purposes, and to no other.

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thy, M.P.

In 1856, 19 & 20 Vic. ch. 54, sec. 1 :—

The estates and property of the late order of the Jesuits, whether in possession or reversion, including all sums funded or invested, or to be funded or invested as forming part thereof, are hereby appropriated for the purposes of this act, and shall form a fund to be called the Lower Canada superior education investment fund.

This special property set apart for education in the province of Quebec, for the Roman catholics and protestants alike, had been swept away by the act under discussion, and justified the interference of the federal parliament in invoking disallowance. Though given by the Crown for specific purposes which constituted the property public domain, this act uses her Majesty's name as enacting that her own estates, or estates she had surrendered to the province, were not hers or the province's.

That by the rule of international law no foreign authority, temporal or spiritual, can be allowed to interfere in the affairs of another country, and under the law of Elizabeth, made specially applicable to this country by the Quebec act of 1774, this principle in particular applies.

That the act violated a fundamental principle of this country, that all religions are free and equal, and that it ought to be disallowed as being unconstitutional and *ultra vires* of a province, and if not on that ground there should have been exercised that judgment, discretion, and policy, to stamp out any attempt which has been made here to establish a kind of state church amongst us.

That the grant of public money of \$400,000 to a particular church was in violation of the rule of the separation of church and state in this country, as in this case there were no conditions attached to the grant, beyond that of being spent in the province, while the \$60,000 given as a compensation to the minority was expressly given for education, and not to go to any sectarian purposes.

The concluding part of the speaker's argument was taken up with the tenets and principles of practice of the Jesuit society, together with its status in the various countries in Europe, from which he maintained that the incorporation of, and the grant of money to the Jesuit body, under any pretext or for any purpose, was an act that should have at once been disallowed if it were passed by

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a provincial legislature, and the establishment of such an order is a matter of concern to the people of the province of Ontario and the rest of the dominion.

In presenting the case for the government, the minister of justice^J said in reply that the Jesuits had a legal title to the property, but that was not a question with which the house had any right to decide; it should be left to that authority which the constitution made competent to deal with, in so far as the rights of the whole dominion and policy of the empire were involved.

Long before the conquest the Jesuits were rewarded for their labours in the wilderness, the schools and churches of Canada, by the gift of these estates from the king of France, under whom the society had been incorporated.

At the conquest, by the law of nations, the conquering power took the sovereignty of the country, the king's fortifications, stores, arms, lands, treasury, &c., but by the law of nations there was no right to touch property of the humblest subject in the country. Had private property been despoiled, it would have been an outrage which would have disgraced British arms, and would have constituted an act the conquering general stated, in the terms of capitulation, would not be done. Under article thirty-four of these terms this society retained its estates.

All the communities and all the priests shall preserve their movables, the property and revenues of the seignories and other estates which they possess in the colony, of what nature soever they be, and the same estates shall be preserved in their privileges, rights, honours, and exemptions.

In return for the cession of Canada this solemn compact had been made by the sovereign of England.

His Britannic Majesty on his side agrees to grant the liberty of the catholic religion to the inhabitants of Canada. He will consequently give the most precise and most effectual orders that his new Roman catholic subjects may profess the worship of their religion, according to the rites of the Romish church, as far as the laws of Great Britain permit. His Britannic Majesty further agrees that the French inhabitants, or others who had been subjects of the Most Christian King in Canada, may retire with all safety and freedom wherever they shall think proper, and may sell their estates, provided it be to subjects of his Britannic Majesty.

It had been stated that the essence of the whole clause is in the qualification 'as far as the laws of Great Britain permit,' and that of itself introduced the laws of England relating to public worship and the supremacy act.

^J Sir John Thompson, K.C.M.G. For his speech, see Canadian Hansard, 1889, pp. 856-869.

To quote the exact words of the speaker: 'The very essence of the supremacy act is that no person outside the realm of England shall have or exercise within the Queen's dominions, even spiritual superiority. If no spiritual superiority in Rome, then no bishop in Canada; if no bishop in Canada, no priest in Canada; if no priest in Canada, then no sacrament for the living or the dying in Canada. Every altar in Canada would have been thrown down by the very terms of a treaty in which his Britannic Majesty, in return for the cession of half the continent, solemnly promised not only that the people should have the right to exercise their religion, as they had been accustomed to do, but that he would give the most precise orders that freedom of worship should be carried out in every particular. Now, sir, obviously the treaty meant no such thing; obviously his Britannic Majesty did not take with one hand the cession of this country, and hold out a false promise with the other. Obviously he meant that there should be perfect freedom of worship in Canada, the newly ceded country, subject only to the legislation which might be made upon this subject from time to time by the parliament of Great Britain; certainly not that it was subject then to the laws as regards freedom of worship in Great Britain.' For the laws of that date did not permit of freedom of public worship to Roman catholics in England; therefore it meant 'in so far as the laws of Great Britain permit freedom of worship in her colonies.' Toleration was extended by the Quebec act of 1774 to the province, where, by a new oath, catholic subjects were not bound to abjure foreign jurisdiction in matters spiritual, as they would have to have done under the form in the act of supremacy, merely taking an oath of allegiance applying to temporal affairs of the sovereign.

Thirty years after the conquest, 1791, the king of Great Britain, by proclamation, suppressed the order of Jesuits in the colony, but 'the king of England had no power to revoke the terms of the charter of incorporation which the Jesuits of Canada had received from the king of France. The parliament of Great Britain could have brought in the whole body of the common law, and could have applied to the colony all the penal statutes which the bigotry of that age might choose to invoke. But the king of England had probably no such prerogative. If the king grants a charter, the king himself, with all his power, cannot revoke it. It is only parliament who can do that, and in this instance, by the attempt, I venture to think, of the king to suppress that order, and to revoke that charter, he exceeded the authority which he possessed.' It had been urged that all the common law of England had been introduced into Canada by royal proclamation. But by the law of nations acknowledged by English law, the laws of a conquered country prevail until new laws

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have been imposed. Such under the constitution of Great Britain could not be effected by the monarch; for 'the king of England could not introduce the common law by his proclamation in violation of the treaty which he had made in 1763, and by the terms of the treaty he had reserved all those rights which touch this question, even in the remotest degree. On the death of the last surviving member of the corporation in Canada in 1800, probably by the English law the property escheated to the Crown, but the question had been complicated by the fact that the Pope had suppressed the company of Jesus nearly all over the world. But it is a principle of common law, that whenever property of any kind has been escheated to the Crown, some consideration should be shown to the persons who are morally entitled to it, and regard should be had to the use to which it was intended to be applied.'

The attention of the house is drawn to the fact 'that the very brief by which these properties were taken possession of on the part of the Crown, when they were eventually seized, does not allege the right of escheat, but declares the right by which the Crown intended to claim the properties to be the right of conquest—a right which, as I have said, is repudiated by the law of nations, was repudiated by the Crown officers of Great Britain at the time, and which, after all that has been said in this debate, has not had one word said in favour of it. That was the only title by which Great Britain claimed she had a right to these estates.'

The subsequent statutes having vested the title in the province of Quebec, which had been admitted by the legislature as good title; the act under discussion admits merely that there exists a moral claim to some degree of compensation that was binding upon the legislature to discharge. This claim was based on the action of the united hierarchy of Quebec, which had always put in a claim against the property whenever, at any time, portions of it had been put up for sale. This moral claim, by unanimous vote of the legislature, was recognised as just; it was not therefore within the province of the federal authorities to exercise a superior and overruling judgment, and declare that 'the legislature arrived at a wrong conclusion.' 'I can state the matter no more forcibly than in the very words of one of our opponents on this question, who declares that the authority given to the provincial legislatures over certain classes of subjects carries with it, like all authority, a liberty to error which must be respected so long as the legal power is not exceeded, and the error is not manifestly subversive, legally or morally, of the principles of the constitution or of the great objects of the state. As far, therefore, as we have to consider the power of the legislature to recognise a moral obligation—leaving out of sight for a moment the theological

questions which my hon. friend from Simcoe (Mr. McCarthy) and I are to join issue on, with a view to the house passing judgment as to which is the better theologian forsooth, and as to whose advice on the question of theology his excellency the governor-general as the supreme theologian is to act—I contend that the legislature had supreme authority to decide, and had a perfect right to decide, without veto or controlling authority at Ottawa, even though we thought they decided erroneously.’

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Regarding the claimants to this property, the bishops of the province said: ‘As a result of the suppression of the society of Jesus in this province we were vested with all the estates as the ordinaries of the various dioceses in which these properties were situated.’ Nay more, they said: ‘We have inherited their moral claim too, because when the means were stricken from their hands of carrying on the missionary work and the work of education, we took it up and, by the sacrifice of our people’s labours and treasures, we built up institutions of education all over this country.’

The Jesuits had in the meantime been reinstated and reorganised in the province, and they became claimants as well as the bishops to the property. In order to clear the title of dispute, it became necessary that the two parties should arbitrate and leave the decision to an authority jointly recognised to be superior to both. ‘It so happened that the hierarchy of Quebec and the other contesting parties who struggled for compensation for this moral claim were both members of the same church, and by their membership recognised supreme authority in the head of that church to settle their disputes, even though the settlement should be against their will. The head of their church had that authority—not by any provision of the law of Quebec mind, not by any provision recognised by English law mind, but by the consent of the parties who were free to belong to that church and free to leave it, and while they did belong to it were subject to a spiritual superior. He had that power by their choice; he had the right to say to one or the other, no matter how small or how great the proportion might be that was divided between them: “You must submit; it is a fair settlement between you, and I, as your supreme arbiter, bind you by my decision.” The government of Quebec, therefore, having made up its mind to recognise the moral claim, if for no other purpose, for purposes of public policy, found that they could not arrive at a solution of the question without some person to act between the claimants and to bind them both. It was only by a method like that that they could reach a solution, paying once, and once only, the value of this moral claim. Now, that being so, let me see what was done in pursuance of that method of settlement. The head of that church, so possessed

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with power to preclude the Jesuits from making any further claim, so possessed with power to preclude the bishops from making any further claim, authorised, in 1884—and this is an important fact, as the house will see when I proceed a little with the argument—authorised the archbishop of Quebec to act as his attorney in the negotiations for the settlement. On the 7th of May, 1887, a document appears which has been one of the means of exciting hostility to this act. On the 7th of May, 1887, the head of the church *reserved to himself* the right to settle the question with regard to the value of that moral claim and the division of the proceeds. Reserved it to himself in virtue of his prerogatives as a potentate? Not at all. Reserved it to himself simply in the withdrawal of the authority which he had given to the archbishop of Quebec, and left himself unrepresented in the province by any attorney whomsoever. And, therefore, when it is said that the Pope reserved to himself the right to settle the question, he was not by any means claiming to reserve any right in the public domain in the province, or any right to the appropriation of money of the province. He was simply withdrawing the power which he had given to another person to settle the question, and saying: “Until a new authority is given, you will negotiate with me.” The next step, sir, was on May 17, 1888, and that was in a letter which was written by Mr. Mercier, the first minister of Quebec, and which, without an undue desire to defend the propriety of these negotiations, the policy of the act, or any other step of the transaction, I think has been very much misunderstood in this discussion. The letter recites, among other things, that the holy father, by reserving to himself the settlement of that question, virtually had cancelled the authority, the only authority, which existed in the province of Quebec, to negotiate with the government.’ Here the minister read extracts from Mr. Mercier’s letter, contained in the preamble to the act, which recited the difficulties in the way of sale, and which concluded with:—

Under these circumstances, I deem it my duty to ask your eminence if you see any serious objection to the government’s selling the property, pending a final settlement of the question of the Jesuits’ estates.

‘My hon. friends so far misconceived that request as to represent it to be a petition on the part of the government of the province to a foreign potentate for permission to sell the property, a permission which they did not need, because by the law of the province they had the power to sell it, and they had from year to year sold portions of it, and put the proceeds in the public treasury. But in asking his consent to the sale of the property, they were asking that, when they brought it to the market again, they should not be

met by the protests of the bishops whom he had the power to control; and, therefore, when the first minister said: "Will you permit this property to be sold, pending a final settlement of the Jesuits' estates?" he was simply asking that that protest should no longer be made, and that there should be a consent to the sale on the part of all who asserted any claim whatever, even though it were only the shadow of a moral claim. He said: "This is a receptacle for filth, so much so that it has become a public scandal: let us all agree that it shall be sold, pending a settlement of the Jesuits' estates." Surely that is only the ordinary transaction of everyday life, when a man has possession of real estate to which another sets up even an unfounded claim. He will say: "Rather than that this property should go to waste and be a public nuisance, better that we should all consent to sell it." Yet we are told that the first minister went to the feet of a foreign potentate to enable him to exercise power which he ought to have found in the statutes of his own province. He was not denying his legal title or power; but he was simply saying: "Give me your consent, so that this claim, whether little or much, shall no longer stand in the way of a sale for the benefit of all concerned." He said:—

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The government would look on the proceeds of the sale as a special deposit to be disposed of hereafter, in accordance with the agreements to be entered into between the parties interested, with the sanction of the holy see.

Simply this, that all parties claiming the property, or any rights in respect of it, shall agree that the property shall be sold and the proceeds shall be kept inviolate, so that anybody having any claim against the property shall not be prejudiced, but shall have the same claim as before—precisely the same arrangement as any business man having property to sell would make with his adversary. The letter goes on to say:—

As it will perhaps be necessary upon this matter to consult the legislature of our province, which is to be convened very shortly, I respectfully solicit an immediate reply.

'We were told in sarcastic tones to-night that it was absolutely necessary to go to the feet of the sovereign pontiff, but it might only perhaps be necessary to consult the legislature of the province of Quebec. I say, when we know the facts with regard to that property, the criticism becomes unfair. The legislature of the province of Quebec had a ready power to sell those estates by law, and therefore, unless it were agreed upon with the head of the church that the property should be sold under these conditions and an agreement were made to value this very claim, and to put aside

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funds to meet it, there was no necessity to consult the legislature at all. If the authority to whom that letter was addressed had declined the negotiations, it would not have been necessary to consult the legislature, because the provincial government had all the legal authority the legislature could give them. It was only in the event of a compromise being arrived at and the payment of money being involved, that it was necessary to consult the legislature at all. And yet this letter has been put to the house this very day, as if, forsooth, the fair and true meaning of it was that it was only perhaps necessary to consult the legislature, but at all events it was necessary to consult the holy see. Now, the answer to that was in these words:—

I hasten to notify you that, having laid your request before the holy father at the audience yesterday, his holiness was pleased to grant permission to sell the property which belonged to the Jesuit fathers before they were suppressed, upon the express condition, however, that the sum to be received be deposited and left at the free disposal of the holy see.

The claimant representing this moral claim says: "I agree that you shall sell that lot in the city of Quebec, but if you sell it, place the fund to my credit in order that we may know where it is, when we arrive at a satisfactory conclusion as to what shall be done with it." The answer of the first minister was that he declined to accede to that, but he proposed what would be the ordinary solution of business people, that the government retain the proceeds until this dispute shall be settled and the final answer received from Rome. Thus what is declared to be an assumption of authority on the part of the Pope, actually in contravention of the supremacy act, and what we are told actually trails the Queen's honour in the dust, is that the Pope consents to the Quebec government retaining the proceeds of the sale of the Jesuits' estates, subject to a future settlement of the dispute. The government of Quebec, pending the settlement of the claims of these two litigants, which were to be held in suspense to be settled, not before the sale of the property but afterwards, retained custody of this fund; and when the authority representing these rival claimants agrees to this proposition, it is asserted, forsooth, that because he uses the word "allows," meaning evidently "consents," he has encroached on the prerogative of the Queen. In agreeing to the government retaining the proceeds of the sale of the Jesuits' estates, he acted simply as the arbiter between the two contesting claimants. He allows this simply as the person who, as the head of the church to which the claimants belong, has, by their own choice, a right to give this consent; and yet when he consents to that, it is actually declared that he is asserting the prerogative of a foreign potentate in derogation of the prerogative of the Queen. I repeat that when we know the facts with regard to the situation

of this property, and with regard to the position of the two rival claimants, it is impossible to misunderstand, and almost impossible for ingenuity to misrepresent, the preamble of this act, as unfortunately it has been misrepresented during the long discussion which has taken place, since the act was passed, in various parts of the country.'

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After referring to the stipulations as to the full liberty accorded the holy see to dispose of the property under the terms of a deed, the minister goes on to say :—

'Then follows the clause to which above all others exception is taken, and to which I shall ask the special attention of the house:—

That any agreement made between you and the government of the province will be binding only in so far as it shall be ratified by the Pope and the legislature of this province.

Now, when we look at the act itself, when we see what the government of the province of Quebec asked the legislature of Quebec to do, when we see them ask the legislature of Quebec to vote in extinction of this moral claim, whatever it was worth, the sum of \$400,000, we cease to be surprised and to be deceived as regards the effect of that provision of the statute. The ministry of Quebec were dealing with two rival claimants, the hierarchy and the Jesuit society. They were dealing also with a third party, the Pope, who occupied the position of mediator by consent between these two, and the first minister of Quebec stipulated that before the province should be asked to pay one dollar of the money, it should have a conveyance, in the first place from the fathers of the society, in the second place from the Pope himself, and, in the third place, from the sacred college of the propaganda and the Roman catholic church in general. He stipulated that before he should be bound to pay a dollar of that money, nay, even before he should ask the legislature of Quebec to authorise him to pay a dollar, he should be in a position to say: "I have obtained a complete release from all the parties who for ever after can assert the slightest right or title or the slightest claim, legally or morally, in regard to these estates." Why could he not do this? Could he have said: "I ask the legislature of the province of Quebec for authority to pay this money on obtaining a conveyance from the fathers of the society"? Would he not have left outstanding the rights of the hierarchy, who contested, every inch of the way, the rights of the fathers of the society to the proceeds of the settlement? Would he not have left outstanding still the possible claim of the authority superior to them all? I assert it without fear, that the contention will not commend itself to the good sense of the house, that that provision No. 7, which is taken such great exception to, is a distinct provision *against* the authority

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of the Pope and not in favour of the authority of the Pope. In fact, by that provision the substance of the agreement was this: "While I am willing to offer to you \$400,000, I am not willing to be bound by my offer until your master ratifies your agreement to accept it. I will not only not pay you a dollar of that \$400,000 until every one of you gives me your conveyance, but until the greatest superior you have on earth gives me his deed, and until I get all that, I will not ask the legislature of Quebec to give me authority to pay you a single dollar." And yet, because the legislature of Quebec demanded, before it should put that money even at the disposition of the governor in council, that they should have everybody's rights foreclosed, and that the highest authority the claimants recognised on earth should give his deed also, and more, that the college of the propaganda should also give its release, and that every step down to that point should be without prejudice to the rights of the province of Quebec, we are told that this is an assertion of the prerogative of a foreign potentate. I am dealing with no merely legal theory upon this question. I am not devising any excuse for the legislation of Quebec. I say that the legislature of Quebec so understood it. It was so explained to them. I hold before me a statement which the first minister who introduced that bill into the legislature made to that legislature, and upon which they passed the bill. He says:—

In the first place we must not mistake the bearing of this declaration, nor forget that it was inserted as a protection.

The legislature of Quebec passed it as a protection on the statement of their first minister. They passed that provision unanimously as such protection, and yet months after we are to put a different interpretation upon what their intention was, and to ask that his excellency, a stranger to that legislature, a stranger to their motives, should decide that that was not their true motive at all, that it was not a protection but a distinct challenge of the supremacy of her Majesty Queen Victoria.' Mr. Mercier said to the house:—

And so that there may be no misunderstanding, so that the transaction may be final, so that the settlement may no longer be open to discussion by the religious authorities, we insist that the Pope shall ratify the arrangement. There is no question of having the law sanctioned by the Pope. Let us not play upon words.

Referring to a clause in the letter of May 1, 1888, which states:—

That the amount of the compensation fixed shall remain in the possession of the government of the province as a special deposit, until the Pope has ratified the said settlement, and made known his wishes respecting the distribution of such amount in this country,

the minister said: 'Before I leave this stage of the transaction, I repeat that this was distinct legislation against any possible rights

or claims on the part of the Pope, and that any protestant legislature in this country—I say more, the parliament of the United Kingdom—if it had been called upon to pass a statute affecting property in regard to which there were foreign claimants, high or low, would have passed a provision to that effect, and achieving that result. I admit that the words which give offence to persons of various other persuasions throughout Canada, and make distinct reference to the Pope, might not have appeared in the preamble to an act of the United Kingdom. I admit that it would have been in better taste, in view of the great difference of opinion which exists in this country on matters of that kind, if that language had not appeared in the act, and if the same result had been obtained, as the first minister of Quebec says it might have been, in a different way; but the result, whatever may be the form of words used, is a proper result, guarding all the rights of the province until everyone else had given up his claim. And, when it comes to a question of disallowance, we are here to advise disallowance or allowance, not upon the form of words, not upon the question of the draftsman's taste, but according to what we believe was the true meaning and intent of the act itself.'

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'With reference to the assertion made and argued with force in the house that the act denied the supremacy of the Queen, let me ask what rights her Majesty had in this property, as the spiritual or as the temporal sovereign? Absolutely none whatever—absolutely none whatever, excepting that she stood as the trustee for the province of Quebec. Her own personal rights were not affected, her sovereign rights were not affected. These were no part of her Majesty's domain, they were no part of her Majesty's revenue. If they were, under this act, all sold and turned into money to-morrow, not one dollar will ever pass into her Majesty's treasury, public or private, not one dollar will ever be disposed of under the advice of her Majesty's ministers. Her Majesty, with regard to those lands, had no interest, either as the spiritual or the temporal sovereign. Let me ask, then, in what particular that act derogates from the authority of her Majesty as head of her church, or as head of any religion in the British empire? None whatever. It is purely a question of temporal concern, purely of the public domain of the province of Quebec. My honourable friend from Victoria (Mr. Barron) said last night that it derogated from her authority, inasmuch as it placed a portion of the public money in Quebec at the disposal of a foreigner. It does not, I submit, place the public money of the province of Quebec at the disposal of a foreigner; it sets aside a sum of money for the extinguishment of a claim upon the public property of Quebec, and then calls upon those who are

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litigants in regard to it to abide by the decision of their arbitrator in the matter. . . . Now, I would be content if so much had not been said upon this subject as to mislead the judgment of hundreds of persons in this country, whose judgment upon any public question is well worth having—I would be content to rest the case there, and to say that no right of her Majesty, either as a temporal or a spiritual power, is in the least degree involved ; but when we are taken so far afield upon the question as to go back into the legislation of three hundred years ago, when we are asked to apply to this question the supremacy act, which would not have the slightest bearing upon it, even if it should be in force in the province of Quebec, I feel bound to follow out that argument to some extent for the purpose of showing how unreasonable the demand is that under the British North America act, and in this day of colonial rights and of self-government, the federal authority in Canada, forsooth, is to undertake to control the legislation of one of its provinces, according to the coercive legislation which used to exist in the mother country three hundred years ago. I have reminded the house what privileges were, even as regards the act of supremacy, ceded to the people of Quebec by the terms of capitulation, by the terms of the treaty, and by the terms of the Quebec act. I have shown that absolute freedom of worship was extended by the treaty of Paris, and by the Quebec act ; I have shown the house, I think, what is the meaning of the reservation as to the laws of England then in force as regards public worship in that country. Sir, in the year 1765 the law officers of the Crown made this statement on their responsibility to the government :—

Her Majesty's Roman catholic subjects residing in the countries in America ceded to her Majesty by the treaty of Paris are not subject in the colonies to the incapacities, deprivation of rights and penalties, to which the Roman catholic subjects in the kingdom are subject.

'The first minister of that country, Lord North, then said the same thing in debate. [Here the extract was read.] Well, sir, let us not in dealing with this question of supremacy be more restrictive on the people of our own country in favour of the authority of the sovereign, whom we all revere, and whose powers and prerogatives we all wish to maintain to the utmost, than the sovereigns of Great Britain have been themselves. What has been their action in respect to this question of the supremacy? Let me read to you a passage in Lord Thurlow's statement in the debates of 1774 :—

I stated in the beginning that it did not affect to relate to Canada, but I said that the capitulation did reserve all their effects, movable and immovable. But even if it were otherwise, is it to be supposed that the tithes would accrue to the king? The tithe is collateral to the land, not

sunk in it. To give the right to it is giving to the secular body as well as the regular clergy all they were in possession of before. It was always in my opinion an established fact, that the clergy (in Canada) were entitled to tithes, though they might not have use for them. (Debates 1774, p. 71.)

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So that the people in the province of Quebec, who are said to-day to be under the provisions of a supremacy act so severe that they cannot recognise the superiority of a foreign bishop, were, in 1774, by her Majesty's attorney-general, declared to be subject to their own laws so far that their clergy were entitled to collect tithes from the people, although perhaps not by authority of law. Well, seventy-six years ago, by a solemn act of state, the Roman catholic bishop of Quebec was recognised by the governor of the province under royal instructions. We are told that the act of supremacy was in force ; and yet that man was a bishop simply by the superiority of the first bishop of his church. He was a bishop because he had received from Rome the bulls which, under the statutes of Queen Elizabeth, it was high treason to bring into the country at all. That was the way in which the religious restrictions of the people of this country were treated upwards of seventy-five years ago by the Imperial authorities ; but after the lapse of three-quarters of a century we are to be wiser, and we are to enforce against a great section of our free people legislation reserving rights to the Crown which the Crown deliberately chose to ignore seventy-six years ago.

' . . . But since that period, since the period when the officers in this country charged with the maintenance of the rights of the Crown, which, as I have said before, were infinitely less restrictive than we are asked to believe them to be to-day, three-quarters of a century later, what a change has taken place in the colonies of British North America ! We have been placed upon a different footing. We have received free institutions, we have received legislative powers, and by the voice of our sovereign, by the voice of her parliament, by the policy of her ministers, as expressed in every act of state, it has been declared that, subject only to those matters which are of Imperial concern, we shall be as fully clothed with the rights of self-governing freemen in every part of Canada as are the subjects in the heart of England. And yet we are told now that we are under, not only the restrictive legislation of three hundred years ago, but that no legislature of Canada has power to repeal any restrictive legislation, and that any restrictive legislation of that kind is beyond the competency of a provincial legislature. Why, we heard last night the singular statement that a provincial legislature has only a derived or delegated authority. I deny that

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statement as explicitly as it is courteous to deny any statement made by any honourable member of this house. I go further and I say that, within the limits of its authority, and subject only to the power of disallowance, a provincial legislature is as absolute as is the Imperial parliament itself. The Imperial parliament is not restricted as to the subjects over which it can legislate, the provincial legislatures are restricted in regard to the subjects on which they can legislate, but in legislating upon these subjects a provincial legislature has all the rights which it is possible for the Imperial parliament to confer. I say more: I say that a provincial legislature, legislating upon subjects which are given to it by the British North America act, has the power to repeal an Imperial statute in so far as it interferes with its control over those subjects. That while there was an apparent restriction, by the one hundred and twenty-ninth section of the British North America act, to a repeal or modification of an Imperial act by colonial legislation, we have had—since the passing of this act—three decisions of the judicial committee declaring the right of a provincial legislature—within matters of its control—to repeal a statute of the Imperial parliament, viz. *Harris v. Davies*,^k *Powell v. Apollo Candle Company*,^l and *Hodge v. The Queen*.^m In the last-named case the judgment said:—

It appears to their lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial parliament. When the British North America act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers, not in any sense to be exercised by delegation from or as agents of the Imperial parliament, but authority as plenary and as ample within the limits prescribed by section 92, as the Imperial parliament in the plenitude of its power possessed or could bestow. Within these limits of subjects and areas the local legislature is supreme, and has the same authority as the Imperial parliament.

Well, sir, later on we had the not forgotten case of *The Queen against Riel* before the privy council, in which this state of affairs was shown. There had been three Imperial statutes passed expressly for the regulation of the trial of offences in Rupert's Land, now known as the North-west Territories. The statutes of Canada contained provisions repugnant to those, and on the appeal to the

^k 10 L. R. Appeals, 279.

^l *Ib.* p. 282.

^m 9 L. R. Appeals, 117.

privy council it was decided that the parliament of Canada had the power to pass legislation changing those statutes and repealing them if necessary. I infer from this that in touching on a question of religious liberty, which is surely a civil right of the people of the province, the provincial legislature is untrammelled in the exercise of its power by the Imperial legislation of centuries ago. I say, therefore, that even though it can be contended that this statute was in any degree a derogation from the restrictions of the supremacy act—from the oppressive restrictions of the supremacy act—and if it should be seriously decided that the supremacy act prevails in British North America, that we have no freedom of religion, that no man has a right to dissent from the church of England, that no man has a right to exercise the catholic religion, that no man has a right to exercise submission to a superior, whether that superior be the president of a conference, the moderator of an assembly, or the first bishop of his church—then, I say, the first duty of this house, the first duty of every legislature in the provinces of Canada, would be to declare that we have in this nineteenth century the rights of freemen and the rights of religious liberty according to our consciences, and to say that that act, three hundred years old, and for two hundred years and upwards ignored in the United Kingdom, shall not restrict the people of these provinces in their right of belief and freedom of worship, and their right under the British North America act to have a constitution similar in form to that which our fellow-subjects in the United Kingdom enjoy.’

The minister then reviewed the successive legislation in Canada in support of this policy.

‘Again addressing myself to the argument that it is not necessary for us in British North America to be more restrictive as regards the rights and powers of the Crown than the Crown has been in England, let me call the attention of the house to the fact that eighty years ago, in the heart of England, a magnificent institution of learning was placed under the control of this same order, in which they have been carrying on every year since the education of hundreds of English youths, and that that institution at Stonyhurst has been added to by institutions all over England. Are we to say that the act of supremacy, the keen edge of which is not to be applied in Great Britain, or that the prohibitory legislation with regard to the Jesuit order, which is not to be applied in Great Britain, must be applied to one section of the people in British North America, and applied under our federal system by the arbitrary power of disallowance with which his excellency is entrusted? . . .

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‘The greatest writer on the subject of criminal law which the country has produced, Sir Fitzjames Stephen, has put the question in two paragraphs, and his authority upon it will not be denied; the acceptability of his sentiments with regard to the United Kingdom will not be questioned; and he says this:—

For two hundred years government has been carried on—
and he is speaking of government in the United Kingdom—
—without prejudice to differences of opinion which in various times were regarded as altogether fundamental.

For the last two hundred years in England, I venture to say, government could not have been carried on if it had not been by practically ignoring legislation which previously was levelled at differences of opinion which were considered altogether fundamental. . . . I have referred to the statement of Sir Fitzjames Stephen as to the value of this legislation to England, and I will cite another passage which, for its terseness and its force, is worthy the attention of honourable gentlemen. He says, referring to the legislation against the Jesuits in the year of George IV. :—

These powers, I believe, have been considered, ever since they were passed, as an absolutely dead letter. Our ancestors walked in darkness, and we have solved the problem which was too hard for them, by recognising liberty of conscience as a principle of universal application.

Referring to the statement advanced in favour of disallowance of the act on the ground that it misappropriated the property it related to, the minister gave it as his opinion that there was nothing in it to sustain such an argument, as the provincial legislature had all along ample power of sale, and the act made no change as to what might be done with the property or money, for ‘The last clause of the act provides that when these properties are sold, they are to be subject to the disposition of the legislature. Are we to infer and to advise disallowance on the ground of that inference, that the legislature of the province is going to betray its trust with regard to any property, when it has never made that declaration or never sought power to desert the trust? I will tell the house what is the absolute fact on this point: That the minority in the province of Quebec, that those interested in higher education, that those interested in any way in the execution of the trust, have not suffered one whit or jot by the passage of the act. The fact has been that the revenue from those estates has been paid from year to year into the consolidated revenue fund and not into the fund for higher education. The fact is likewise that the proceeds of large portions of that property which have already been sold have, from year to year, been placed to the credit of the consolidated revenue,

and spent for the general purposes of the province. From year to year, the provincial legislature, not out of the revenues of the Jesuits' estates or the proceeds of the Jesuits' estates, which were too small for that purpose, but out of its consolidated revenue, has made ample provision for the higher education of the province; and after the argument made this afternoon about the way in which the minority would be prejudiced, and the supineness of the minority in submitting, as it was said they would be willing to submit, to this legislation, and the breach of trust which was apparent on the act itself, in the diversion of the only fund that exists for the higher education of the province, the house will be surprised to learn that from year to year—I speak in general terms—the allowance in the province of Quebec for the higher education made out of the consolidated revenue fund has been, on an average, more than three times the annual proceeds of the Jesuits' estates. . . . And when I have reminded the hon. gentleman that it is not a question of trust, that there is no diversion of trust by the authority of that act, and that these estates have not been the source from which higher education has been supported, I think he will be almost inclined to agree with me that I was right after all in saying this was a fiscal matter within the control of the province. But this is not the first time, although it is the first time this excitement has been raised with regard to it, that this body of persons, who have been spoken of so severely in this debate, have been dealt with by the province of Quebec. I have in my possession a list extending back over fifteen years of appropriations in the supply bills made by the legislature of Quebec to support the higher education carried on by this society within that province, and, according to the statement we have heard this afternoon, all that has been unconstitutional, and every one of these supply bills ought to have been disallowed, because, forsooth, they were ignoring the distinction between church and state. I think it is rather late to treat this question as anything other than a fiscal question, and that the difference between the supply bills in all those fifteen years and the act which is now being discussed is simply a question of degree and of amount. . . . The reason why, as I presume, the restriction has been imposed in regard to the 60,000 dols., and not in regard to the 400,000 dols., is that the 60,000 dols. is voted for educational purposes purely and simply, and while the 400,000 dols. has every prospect of being so applied, because it is voted to a body whose business it is to teach, still it is paid to them in extinction of a claim which they had made to a part of the public domain of the province. But we were told, and this is the last argument used by my hon. friend from North Simcoe (Mr. McCarthy), but one to which I intend to advert, that the grant of money to this corpo-

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ration was a church endowment which violated the principles of the separation of church and state in this country. I pass by at this moment the position which any church occupies in this country. I do not intend to discuss how far, in any portion of the country, any church may be considered as established; but I do say that it passes the power of ingenuity to show that the grant of money to a corporation of teachers and preachers is the endowment of a church in Canada. It is true that a church may be a society of preachers and teachers, but this society is not a church, and in the most illogical way in which a fallacy could be put on paper, this resolution asks the house to come to the conclusion that, because a society incorporated under a statute of the province and employed in preaching and teaching the tenets of a certain religion receives a grant of money, that is the endowment of a church within the province. I venture to say that there is no one in this country who knows the facts upon which that resolution is based and who reads that resolution but must be surprised that it should receive the support, as it has done, of able and intelligent men in this house. Let me say to my hon. friend from Simcoe (Mr. McCarthy) that this is no more the endowment of a church, and that it is no more an interference with the separation of church and state in this country than would be the endowment of a hospital or an orphanage or an asylum which was under the care of a religious organisation. We all cherish the principle that there should be no church control over the state in any part of this country, but my hon. friend proposes something worse than that. He proposes that we shall step into the domain of a provincial legislature, and shall say that no provincial legislature shall have the power to vote any money to any institution if it partakes of a religious character. It may profess any other kind of principle. It may profess any objectionable principle, and it is lawful to endow it, but, if it professes the Christian character, it is, forsooth, unconstitutional to allow such an act to go into operation. . . . I think that whenever we touch these delicate and difficult questions which are in any way connected with the sentiments of religion, or of race, or of education, there are two principles which it is absolutely necessary to maintain, for the sake of the living together of the different members of this confederation, for the sake of the preservation of the federal power, for the sake of the goodwill and kindly charity of all our people towards each other, and for the sake of the prospects of making a nation, as we can only do by living in harmony and ignoring those differences which used to be considered fundamental—these two principles surely must prevail, that as regards theological questions the state must have nothing to do with them, and that as regards the control which the federal

power can exercise over provincial legislatures in matters touching the freedom of its people, the religion of its people, the appropriations of its people or the sentiments of its people, no section of this country, whether it be the great province of Quebec or the humblest and smallest province of this country, can be governed on the fashion of 300 years ago.'

Jesuit
Estate
Act.

In support of the government on this question by a leading member of the liberals,^a it was contended that the motion to disallow the act in the name of tolerance was a demand for intolerance, 'laden with mischief because it mingles religious prejudices and religious animosities with the consideration of the question. . . . We have in this motion simply the question of the right of local self-government on the one side, and the assertion of a meddling-some interference and oversight on the other. We have in this motion a proposition to set aside the judgment of a province upon a question within its own jurisdiction, and to replace that judgment with that of a majority of the people, or a section of the people, in another province. I do not think we can permit any such course to be adopted. If we were to do so, it would be practically an end to the system of federal government.'

Hon.
David
Mills.

That in stating the doctrines of hundreds of years ago, it was necessary to take into consideration the circumstances under which they were arrived at, else it was misleading. 'Society has undergone great changes, and that what was regarded as right and proper at that period would be a wholly improper thing to-day. Toleration is of later growth; toleration grew as the state authority was contracted.'

The argument of the member who introduced the question under discussion, that this house regards the power of disallowing the acts of the legislative assemblies as a prerogative essential to the national existence of the dominion, was not borne out by the United States form of government, which had a national existence of 113 years standing, and yet by its constitution the president had no power to veto a state law, it resting with the courts to declare legislation *ultra vires*. Our constitution being similar in principle to that of the United Kingdom, where there is no federal organisation, we enjoy with it responsible government, having a certain sphere of exclusive action assigned to local legislatures, and another assigned to the federal parliament. Where the local government have a right to go to the country on a public question, the federal house cannot be a proper tribunal to decide. 'If you

^a Hon. David Mills. For his speech see Canadian Hansard, 1889, pp. 872-883.

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Estate
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have local self-government conferred upon the people of the different provinces, it is clear that the electors of those provinces, within their constitutional authority, are the ultimate court of appeal for the purpose of deciding whether the political course of their government is what it should be. They are the proper parties, and they alone. It is not to the hon. gentlemen on the treasury benches, but it is to the electors that the local legislatures are responsible for their acts within constitutional limits ; and while they keep themselves within those constitutional limits, I hold that we have not, according to the spirit of our constitution, a whit more right to interfere—to use this prerogative for the purpose of disallowing their acts—than we would have to interfere with the acts of the legislature of the state of New York. They are a distinct political entity for all the purposes for which exclusive power is given to them ; they are constitutionally beyond the control of this government and this parliament ; if they have acted wisely, their own electors will sustain them ; if, in the judgment of the electors, they have acted unwisely, they will condemn them, and will send to parliament representatives who will repeal the law. . . .

‘What would we say in this house if the Imperial government were to interfere in any question wholly within the purview of our authority ? Would we submit to that interference ? You would have the whole country aroused ; you would have it declared that we would not submit to the meddlesome interference of Downing Street ; you would have the whole question about parliamentary government revived again. I say that what would be improper to be done by the Imperial parliament against us would be improper to be done by us against the local legislatures.’ When, in 1875 and 1877, an effort was made in this house to disallow the New Brunswick and Prince Edward Island school bills, on the ground that injustice had been done the Roman catholics of those provinces, the government of the day refused to interfere, because it was considered that the legislation was wholly within the jurisdiction of those provinces. A measure that was then declined the Roman catholics could not now consistently be adopted against them. ‘If the government were completely federal, there would be no power of disallowance, and I have always been of opinion that the power to disallow was an unfortunate provision of our constitution. I have always been of opinion that it would have been, on the whole, very much better to have left the question, as in the neighbouring republic, entirely to the courts, rather than take the risk of the pressure which may be brought on an administration, from time to time, to interfere in a way detrimental to the rights of the provinces.’

After reviewing the question of legal title to the estates the

speaker referred to the argument advanced by the other side, that in making payment to a church, no matter if it be merely the discharge of a claim rightfully due, it served to establish a connexion between church and state. On this point he reminded the house that by the act of the clergy reserves, passed in 1854,^o provision was made for the existing life interest of persons in the fund. By this act, which was to effect the entire separation of church and state, compensation was secured to ministers who had been the recipients of stipends from it. The government at the time declined to assume the responsibility of paying these moneys to the persons concerned, but negotiated with the bishop of the church of England and the heads of other denominations, whereby settlement of the commutation was arranged with the respective churches. 'And that very act, under which the money was paid and which was declared to be for the purpose of putting an end to the connexion between church and state, upon the theory of the member for North Simcoe, actually established connexion between church and state. Then there is another consideration. So far as I remember the provisions of that act, the right hon. gentleman made its provisions depend upon the successful carrying out of the arrangement by those parties who were interested in the matter. If it was treason for Mr. Mercier, and contrary to the act of supremacy, to enter into discussions with any outside person as to the settlement of the disputes in regard to the Jesuit matter, was it not equally improper to enter into a commutation arrangement with a party who was not a member of parliament, who had not a seat in parliament, and was not in any sense a representative ?'

Jesuit
Estate
Act.

Hon.
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Mills.

On the point of the violation of the supremacy act in appealing to the Pope, Roman catholics in this country had a perfect right to do so, according to an opinion expressed by Lord Selborne in 1874 :—

That statute is not understood to make it an offence at law for Roman catholics, in this country or in Ireland, to carry appeals to the Pope. The Pope is a sort of arbitrator, taking a legal view of their position, whom they may consult upon the question.^p

After reviewing the subject of appeals to Rome the speaker adds : ' Now, Quebec received its law from the king, subject to the terms granted in the capitulation. There was no statute of Elizabeth in force, and that statute was not carried to any one of the colonies. I might quote the view of Lord Mansfield, whose authority is unquestioned both in judicial decisions, and in a letter addressed to Mr. Grenville, the prime minister, in 1764, in which he says that the penal laws of the United Kingdom are never carried to a colony

^o Stat. Can. 18 Vic. c. 2.

^p 6 L. R. P. C. App. p. 173.

Jesuit
Estate
Act.

Hon.
David
Mills.

as part of the common law they take with them. If that is so in a colony settled by the people of England, it is much more so in the case of a colony that is secured by conquest. Such a law cannot operate, as the hon. the minister of justice pointed out last evening, unless it would be by the abrogation of all those rights that were ceded by capitulation and contained in the treaty of 1763. Now, we have in the act 14 George III. chap. 83, this provision :—

For the more perfect security and ease of the minds of the inhabitants of the said province, it is hereby declared, that his Majesty's subjects professing the religion of the church of Rome, of and in the said province of Quebec, may have, hold, and enjoy the free exercise of the religion of the church of Rome, subject to the king's supremacy, declared and established by an act made in the first year of the reign of Queen Elizabeth, over all the dominions and countries which then did, or thereafter should belong to the Imperial Crown of this realm; and that the clergy of the said church may hold, receive and enjoy their accustomed dues and rights with respect to such persons only as shall profess the said religion.

‘The whole act of Elizabeth is not introduced by this, but only those provisions, I think sections 7 and 8, which relate solely to the question of the sovereign's supremacy, and that supremacy is not affected, as Lord Selborne points out, by an appeal to the Pope as the spiritual head of the Roman catholic church, who, in deciding questions relating to the church over which he has jurisdiction not incompatible with the civil law, acts as a moral arbitrator. Of course, the position of the Roman catholic church in the province of Quebec is not altogether that of a voluntary association; it has certain connexions with the state. It is not true that we have an entire separation between church and state in all the provinces of this dominion. The Roman catholic church in the province of Quebec occupies a somewhat anomalous position. Under the Quebec act and ever since, that church has been allowed to collect tithes from its members, but not from members of other religious persuasions. The collection of those tithes, for the purposes mentioned, imposes on the church certain obligations,’ which may be enforced by the courts. ‘And so far, on account of its special rights, making it to a limited extent a state church, it has imposed upon it certain obligations, and so far these may be brought before the ordinary civil tribunals for the purpose of their enforcement. But beyond this there is no connexion; beyond this it is purely a voluntary association, and it has the same right of appeal to the Pope as the spiritual head of the church that any other church would have to appeal to the constituted authority of that church. . . . There is nothing, in my judgment, more mischievous than to undertake to pass judgment upon the religious opinions of any portion of the community in a popular

assembly, and make those opinions the pretext for withholding rights and for imposing disabilities. . . . I believe that the more clearly the line of separation is drawn between church and state, the better it will be for all classes in this country, but I admit that I am unable to interfere or to assist in drawing that line in any province except in the province of which I am a member. I have the right to exercise my privilege as an elector, and if the policy that has been carried out is one that I think detrimental to the public interest, I may, in that capacity, oppose it; but I have no right, from my place in this house, to undertake to do for the people of another province what I can only do legitimately in my own province, as an elector of that province. And so, the more clearly we have impressed upon our minds the fact that each province must take care of itself, that it must entirely separate the church from the state for itself, that with that we have nothing to do, that, except by usurpation, we cannot interfere, the sooner we can have clearly impressed upon our minds this line of action, and the more steadily we adhere to it, the better it will be for all parties concerned.'

Jesuit
Estate
Act.

Hon.
David
Mills.

At the close of the discussion the amendment was put and lost on division; the vote standing, yeas 13, and nays 188.^a

The foregoing precedents establish the principle that no interference on the part of the Crown with the action of provincial authorities in Canada, upon any question exclusively within their legislative competence, would be accounted as justifiable, or would be approved by the Imperial government, unless under very special and extraordinary circumstances, which could scarcely be anticipated or possibly be defined beforehand.

The supervisory control of the Crown over all acts of legislation within the jurisdiction of the constituted authorities in any province which forms a part of the dominion of Canada, has been delegated to and is now solely exercised by the governor-general in council; that is to say, by the governor-general acting under the advice of ministers responsible to the dominion house

Jurisdic-
tion of
dominion
and local
authori-
ties.

^a Jour. H. of Com. Canada, 1889, p. 206. When the 400,000 dols. was divided up the Jesuits received of it 160,000 dols.; Laval University

140,000 dols.; and the balance went to the archbishops and bishops of the province. Que. Sess. Pap. 1890, No. 35, p. 52.

of commons. It is to this tribunal that appeal should be made for the disallowance of provincial enactments.

Appeals
for redress
of griev-
ances.

On the other hand, the redress of grievances arising out of the operation of provincial laws can only be constitutionally afforded by the provincial legislatures by which such laws have been enacted ; except in cases wherein the acts complained of have been unlawfully passed, or are open to objection upon grounds that would justify the interference of the governor-general in council, or the dominion parliament, with the same.

It is true that every British subject retains the right to petition the Queen in council for reparation of injuries, whether they be real or imaginary, and that the prerogative right of the Crown to interpose, at least to the extent of recommendations or suggestions to any subordinate or inferior government or legislature throughout the empire, remains unimpaired, notwithstanding the concession thereto of local self-government. Moreover, in the precedents which illustrate this portion of our inquiry, we observe repeated instances wherein appeals have been made, as well by the dominion as by the provincial authorities in Canada, to her Majesty's government to interfere for the promotion of harmony, or for the settlement of disputes, between conflicting jurisdictions. But in all such cases the principle is affirmed, that no interposition to the detriment, in any degree, of the established principle of self-government in matters of local concern would be permitted or approved, whether on the part of the Imperial or dominion governments, in their several and appropriate spheres of action, in matters within the acknowledged competency of either tribunal. This broad principle admits of but one exception ; namely, a reserved right of interference by the Crown itself, under exceptional and undefinable circumstances and as a last resort, or

at the formal request of persons or of the particular governments concerned.^r

Appeals
for redress
of griev-
ances.

The following precedent is in point in this connection :—

In 1875, Mr. G. H. Ryland petitioned the governor-general, complaining of a bill then pending in the Quebec legislature, and that afterwards became law, to sub-divide the registry office for the registration of Montreal into three divisions. This bill, he alleged, was to the detriment of his vested rights and interests in respect to the registrarship of Montreal, which had been conferred upon him, by the Imperial government, in lieu of a patent office formerly held by him under the Crown in Canada. Certain inhabitants of Montreal likewise petitioned the governor-general for the disallowance of this statute.

Ryland's
case

These petitions were referred to the minister of justice, who recommended that the provincial legislature of Quebec should be invited to give further consideration to Mr. Ryland's just claims, before the question of disallowing this act should be entertained. The lieutenant-governor of Quebec, in reply to this suggestion, declared that these claims had been thoroughly examined ; and that it behoved Mr. Ryland to address any remonstrance he desired to make thereupon to the provincial legislature, which had acted within its constitutional limits in passing this law. Consideration for its own dignity and rights would not permit of the question of repealing the act being entertained by that body ; but the provincial government were disposed to accord full and entire justice to Mr. Ryland, and to fulfil all their obligations to him. The dominion government, satisfied with these assurances, and recognising that it was for the local government to decide upon the merits of the case, recommended that the act should not be disallowed. Upon being informed of this decision, Mr. Ryland protested against it, as overriding and nullifying the authority of the British Crown in Canada.^s He afterwards reiterated his conviction that the promises of the Quebec government to satisfy his just claims were illusory, and intentionally deceptive, inasmuch as no compensation had been

^r Can. Sess. Pap. 1882, No. 141, pp. 68, 122, 188, 210. See *ante*, p. 29.

^s *Ib.* 1877, No. 89, pp. 254-269. And see *ib.* 1879, No. 165. For particulars of a similar case in Nova Scotia, see *ante*, p. 61. See also the correspondence between Im-

perial dominion and provincial governments respecting certain legislation in Nova Scotia which operated to the prejudice of army and navy officers stationed in that province. N. S. Leg. Coun. Jour. 1879, App. No. 23 ; Can. Sess. Pap. 1882, No. 141, p. 122.

Ryland's
case.

granted him and no further inquiry made since the passing of the act. In remonstrating against the treatment he had received in Canada, Mr. Ryland informed the secretary of state that he appealed to the Imperial government to secure to him the full amount of compensation heretofore acknowledged to be his rightful due, a moiety of which had been already paid him by the Crown, with the understanding that the Canadian government should be appealed to for the balance. In reply, Sir M. Hicks-Beach, in a despatch dated February 4, 1879, stated that her Majesty's government declined to reopen the case, and could neither ask the Imperial parliament or invite the dominion parliament to grant further compensation to Mr. Ryland. He must seek the redress of his grievance in Canada, from whence must come any further relief to which he might be entitled. In this and the following years Mr. Ryland continued to forward additional remonstrances to the secretary of state, but did not succeed in inducing him to alter his determination.^t

A similar principle was laid down by Sir M. Hicks-Beach in 1879, upon the appeal of an individual who had been dismissed from office in New Zealand, that 'the matter was entirely within the jurisdiction of the colonial government.'^u

Practice
in super-
vising
provincial
legisla-
tion.

Let us now inquire into the constitutional practice, authoritatively established in Canada, to regulate the exercise by the governor-general in council of that supervision and control over provincial legislation which has been assigned to the dominion government by the British North America act.

Upon the first occasion wherein the acts passed by the legislatures of the Canadian provinces came under the review of the central government, the dominion minister of justice, in a report to the privy council for Canada, dated June 8, 1868, submitted the following rules for adoption on this subject:—

That while, under the present constitution of Canada, the general government will be called upon to consider the propriety of the allowance or disallowance of pro-

^t See three pamphlets on Mr. Ryland's case printed in Montreal, 1878, 1879, and 1880.

^u N. Z. Parl. Pap. 1883, A. 1, p.

vincial acts with greater frequency than her Majesty's government has been with respect to colonial enactments, it is 'of importance that the course of local legislation should be interfered with as little as possible, and the power of disallowance exercised with great caution, and only in cases where the law and the general interests of the dominion imperatively demand it.' And 'that where a measure is considered only partially defective, or where it is objectionable as being prejudicial to the general interests of the dominion, or as clashing with its legislation, communication should be had with the provincial government with respect to such measure, and that in such case the act should not be disallowed, if the general interests permit such a course, until the local government has an opportunity of considering and discussing the objections taken, and the local legislature has also an opportunity of remedying the defects found to exist.'

Dominion
review of
provincial
legisla-
tion.

Two possible grounds of objection to provincial enactments are noticed in the preceding report, namely: (1) Where exception might be urged to 'the law' itself, as being in excess of the constitutional powers of the local legislature, or at variance with dominion legislation; (2) Where it might appear that proposed enactments were contrary to the policy which, in the opinion of the governor-general in council, ought to prevail throughout the dominion, in view of the general interests thereof.

In order to facilitate the determination of the dominion executive upon such questions, it was advised that, upon the receipt by the governor-general of the acts passed by the legislature in any of the dominion provinces, they should be referred to the minister of justice, and that it should be his duty, as speedily as possible, to report in regard to such acts as may appear to him to be unobjectionable. If the governor-general

Report
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Dominion
review of
provincial
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tion.

in council concurred therein, their approval of these enactments should be forthwith communicated to the provincial government.

But it should be the duty of the minister of justice to report, separately and in detail, upon any acts which he may consider open to objection :—

- (1) As being altogether illegal or unconstitutional.
- (2) As being illegal or unconstitutional only in part.
- (3) In cases of concurrent jurisdiction, as clashing with the legislation of the dominion parliament.
- (4) As affecting the interests of the dominion generally.

This report from the minister of justice was approved by the governor-general in council on June 9, 1868, and was subsequently transmitted by a circular despatch from the dominion secretary of state to the lieutenant-governors of the several provinces.^v

In July, 1881, the acting attorney-general of Ontario (Mr. Crook) addressed a protest to the dominion government against the course taken in the disallowance of the act for protecting the public interests in rivers and streams. Hitherto, he stated, the principles and procedure laid down in the circular despatch of 1868, above cited, had been invariably observed ; but this bill had been disposed of upon different grounds. Harmony between the central and provincial governments, he contended, could only be preserved by confining the exercise of the power of disallowance to acts objectionable as to their constitutional validity, or obnoxious to the laws or general interests of the dominion. The governor-general in council should not claim to review legislation within the competency of the provincial government, to the detriment of its special responsibility and sovereign authority under the Confederation act.^w

Instruc-
tions re-
quired by
lieu-
tenant-
governors.

In forwarding these regulations to the lieutenant-governors, through the constitutional channel of the secretary of state for the dominion, it is obvious that instructions should likewise have been sent to these functionaries, for their general guidance in assenting,

^v Canada Sess. Pap. 1869, No. 18.

^w *Ib.* 1882, No. 149.

in her Majesty's name, to bills passed by the legislatures of their respective provinces, and in regard to their discretion in withholding the royal assent to bills or in reserving them for the signification of the pleasure of the governor-general, pursuant to the authority which is vested in provincial governors by the British North America act.^x But, in point of fact, the lieutenant-governors (with the exception of the lieutenant-governor of the new province of Manitoba) were formerly left entirely without instructions in the fulfilment of these important functions. The commissions issued to the lieutenant-governors expressly refer to instructions as accompanying the same or as to be given, from time to time, 'under the sign-manual of our governor-general,' or by 'order of our privy council of Canada;'^y yet no instructions, of either an affirmative or a negative kind, were sent from the dominion government to these officers until December 1882.^z Meanwhile the lieutenant-governors, as dominion officers, repeatedly assumed the responsibility of reserving, for the consideration of the governor-general in council, bills which appeared to them to contain doubtful or objectionable provisions.^a They have likewise, in certain cases, 'withheld' the consent of the Crown from provincial enactments.^b

The dominion executive hold it to be at variance

^x See *ante*, p. 439.

^y The phrase in the commission is incorrectly stated. It should run thus (as in a previous form), 'or by our order in our privy council of Canada.' Vide Sess. Pap. 1867-8, No. 16; Can. Senate Jour. 1878, p. 175.

^z See Attorney-General Mowat's memo. of Dec. 16, 1873, in Ontario Sess. Pap. 1st sess. 1874, No. 19; Lt.-Governor Morris's despatch of Feb. 12, 1876, in Canada Sess. Pap.

1877, No. 89, p. 149; and see *ib.* p. 172. And as regards B. Columbia, see Judge Crease's edition of a judgment in June 1880, in the Supreme Court, on the irregularity of holding a criminal court without a special commission from the Lt.-Governor, pp. 48, 67.

^a Can. Sess. Pap. 1882, No. 141, p. 225.

^b See cases cited, *post.* pp. 586-589.

Powers of
lieu-
tenant-
governors.

with the principles of constitutional government for a lieutenant-governor to reserve a bill for the pleasure of the governor-general, which is 'entirely within the legislative authority of the provincial legislature, and in which no dominion or Imperial interests are involved.' 'The lieutenant-governor should only reserve a bill in his capacity as an officer of the dominion, and under instructions from the governor-general.'^c

By constitutional analogy, it may be assumed that lieutenant-governors are not at liberty to withhold the royal assent to bills which have passed the legislative chambers—inasmuch as the power of veto by the Crown is now practically obsolete, in the mother country—or to reserve such bills for the consideration of the dominion government, unless pursuant to instructions from the governor-general in council.

As in England, the governor, representing the Crown, must be one with his ministers in all matters of state, and if he disapproves of a particular measure, should settle the question with them, while the bill is still before the legislature. Irreconcilable disagreement between the Crown and its advisers would necessarily lead to a change of ministry as a method of affecting agreement. But once a bill has passed the legislative body, by ministerial consent or acquiescence, it must ordinarily receive the royal sanction. As a general rule, ministers have no right to permit a measure to which they are opposed to pass through the legislative chambers, and then advise the exercise of the prerogative power of reservation, or of withholding the royal assent thereto.

This prerogative may, indeed, be exercised by a governor-general—as an Imperial officer, for the protec-

^c Orange Bills, Ont. Sess. Pap. Bill, P. E. Island, Can. Sess. Pap. 1st sess. 1874, No. 19; Can. Sess. 1882, No. 141, pp. 158, 161. Pap. 1877, No. 89, p. 154; Church

tion of Imperial interests—or by a lieutenant-governor, under instructions from the governor-general in council.

Powers of lieutenant-governors.

Exceptional cases will, however, arise under all general rules. Practically, under exceptional circumstances, lieutenant-governors in several Canadian provinces have deemed it expedient to reserve bills, and even to withhold the royal assent from bills, which had been agreed to by the legislative chambers, as is elsewhere shown;^d but it is probable that hereafter more circumspection will be exhibited in this respect.

The following minute, approved by his excellency the governor-general in council, dated November 29, 1882, was addressed to the lieutenant-governors:—

The committee of council deem it their duty to call the attention of your excellency to the fact that in several provinces, bills passed by the legislature have been reserved for the governor-general's assent by their lieutenant-governors on the advice of their ministers.

Instructions to lieutenant-governors.

This practice is at variance with those principles of constitutional government which obtain in England, and should be carried out in Canada and its provinces.

As the relations between the governor-general and his responsible advisers, as well as his position as an Imperial officer, are similar to the relations of a lieutenant-governor with his ministers and his position as a dominion officer, it is only necessary to define the duties and responsibilities of the former in order to ascertain those of a lieutenant-governor.

Now it is clear that since the concession of responsible government to the colonies, the advisers of the governor-general hold the same position with regard to him, as the Imperial ministry does with respect to her Majesty. They have the same powers and duties and responsibilities. They ought not to have, and of right have not, any greater authority with respect to the legislation of the Canadian parliament than the Queen's ministers have over the legislative action of the Imperial legislature.

Now in England the ministry of the day must of necessity have the confidence of the majority in the popular branch of the legislature, and therefore they generally control, or rather direct, current legislation.

Should, however, any bill be passed notwithstanding their oppo-

^d See *post*, p. 586.

Instructions to
lieutenant-
governors.

sition or adverse opinion, they cannot advise its rejection by the sovereign.

The power of veto by the Crown is now admitted to be obsolete and practically non-existent. The expression 'le roi,' or 'la reine s'avisera,' has not been heard in the British parliament since 1707, in the reign of Queen Anne, and will in all probability never be heard again. The ministers in such cases, if they decline to accept the responsibility of submitting the bill for the royal assent, must resign and leave to others the duty of doing so.

If, notwithstanding their adverse opinion, they do not think the measure such as to call for their resignation, they must submit to the will of parliament, and advise the sovereign to give the royal assent to it.

Under the same circumstances your excellency's advisers must pursue the same course.

The right of reserving bills for the royal assent, conferred by the British North America act, was not given for the purpose of increasing the power of the Canadian ministers, or enabling them to evade the constitutional duty above referred to.

This power was given to the governor-general as an Imperial officer and for the protection of Imperial interests. It arises from our position as a dependency of the empire, and to prevent legislation which in the opinion of the Imperial government is opposed to the welfare of the empire or its policy.

For the exercises of this power the governor-general, with or without instructions from her Majesty's government, is responsible only to the British government and parliament, and should the Canadian government or parliament deem at any time that the power has been exercised oppressively, improperly, or without due regard to the interests of the dominion, their only course is to appeal to the Crown and eventually to the British parliament for redress.

As has already been stated, the same principles and reason apply, *mutatis mutandis*, to provincial governments and legislatures.

The lieutenant-governor is not warranted in reserving any measure for the assent of the governor-general on the advice of his ministers.

He should do so in his capacity of a dominion officer only, and on instructions from the governor-general. It is only in a case of extreme necessity that a lieutenant-governor should without such instructions exercise his discretion as a dominion officer in reserving a bill. In fact, with the facility of communication between the dominion and provincial governments, such a necessity can seldom if ever arise.

If this minute be concurred in by your excellency, the committee of council recommend that it be transmitted to the lieutenant-governors of the several provinces of the dominion for their instruction and guidance.

(Signed) JOHN J. MCGEE,
Clerk, Privy Council.

The power of disallowance of provincial acts—as well as that of the refusal to sanction reserved bills—has been freely exercised by the governor-general in council, from the confederation of the provinces to the present time. For the most part, this power has been resorted to only in cases wherein the provincial legislatures have passed acts which were unconstitutional, or beyond their legal competency to enact. But it has been sometimes invoked in respect to acts or bills which contained provisions that were deemed to be contrary to sound principles of legislation, and therefore likely to prove injurious to the interests or welfare of the dominion.^e

Disallow-
ance of
provincial
statutes.

On the other hand, the dominion minister of justice has, in numerous instances, declined to advise the positive disallowance of provincial acts although they contained provisions that he regarded as *ultra vires*. Instead of a resort to the exercise of this statutory power, he has sometimes recommended confirmatory legislation by the dominion parliament; or he has merely called attention to the objectionable clauses, with a view to their being amended by the local legislature; or he has proposed to leave it to the courts of law to decide upon the validity of the particular statute, in the event of any question arising thereupon for judicial determination.^f

^e See Canada Sess. Pap. 1877, No. 89, *passim*. *Ib.* 1882, No. 141, p. 226; Nos. 149, 166. And see *post*, p. 529.

^f See *post*, p. 537. For an example of the course adopted by a

provincial government to bring particular legislation into harmony with the limitations imposed by the British North America act, see Nova Scotia Stats. 1877, c. 4.

Disallow-
ance of
provincial
acts.

It has occasionally happened, in the case of a provincial bill, reserved for the consideration of the governor-general, that simply 'no action was taken thereon.' This course leaves the local government free to re-introduce the measure, at their discretion, with any necessary amendments.^g

Lieu-
tenant-
governor
calls at-
tention to
an act.

In 1876, Lieutenant-Governor Morris, of the province of Manitoba, refrained from reserving an act to abolish the legislative council of that province, because the constitutional competency of the legislature to pass it was undoubted. Nevertheless, in a despatch to the dominion secretary of state, he called attention to the questionable policy of the measure, and to considerations which seemed to affect its legality. The dominion government, however, decided to leave the act to its operation; being of opinion that, even if it were invalid, 'it would be contrary to the spirit in which the power of disallowance has been exercised to interfere with the operation of the act.' It would be for the legislature of Manitoba, if necessary, to move the proper authorities for legislation to remove any such doubts.^h

See also the case of the Goodhue estate act (34 Vic. c. 99), to confirm and validate a settlement of property under a will, but at variance with the intentions of the testator. This act was passed by the Ontario legislature in 1871, and assented to by the lieutenant-governor; although he afterwards forwarded to the governor-general a petition from parties concerned against the act, with a statement that he considered the principle involved in this act to be very objectionable, and as forming a dangerous precedent; but in the absence of instructions, and upon the advice of his ministers, he had concluded to assent to it. The dominion privy council, however, recommended that the act be left to its operation, as it was within the competence of the provincial legislature. After being the occasion of much litigation, this act, though of doubtful expediency, and an unusual if not unprecedented interference with private rights, was, nevertheless, declared by the Ontario court of error and appeal, in 1873, actually to be within the scope of provincial legislative authority, and yet to be virtually inoperative on account of certain defects and omissions therein.ⁱ

In the session of 1868-69, the Ontario legislature

^g Can. Sess. Pap. 1882, No. 141,
p. 225.

ⁱ Grant's Chancery Rep. v. 19,
366.

^h *Ib.* 1877, No. 89, pp. 148-151.

passed an act to define their powers and privileges, which sought to confer upon the legislative assembly and its members the same privileges as those enjoyed by the house of commons of the dominion. The competency of the provincial legislature to pass this act was doubted; and, upon the recommendation of the dominion minister of justice, the question was referred to the consideration of the law officers of the Crown in England. They gave it as their opinion that, in view of sections 92-95 of the British North America act, this enactment was *ultra vires*. Whereupon, notwithstanding that the attorney-general of Ontario protested against this conclusion in an able memorandum, the statute was disallowed by the governor-general in council.^j In 1876, another act on the same subject was passed by the Ontario legislature (the 39 Vic. c. 9), which conferred certain specified powers and privileges only upon the legislative assembly and upon its members. This act was also objected to by the dominion minister of justice, upon the assumption that it contained several provisions that were *ultra vires*. But inasmuch as a similar act, passed by the Quebec legislature in 1870, had been left to its operation, he advised that the same course should be pursued in regard to this statute, leaving it to the courts of law to decide upon any question that might hereafter be raised that should involve the consideration of the legality of this measure.^k

Disallow-
ance of
provincial
acts.

Doubtful
acts left
to con-
sideration
of the
courts.

In 1878 the constitutional question as to the competency of the provincial legislatures to pass acts of this description came under the review of the supreme court of the dominion. The judgment of this court was in favour of the legislatures, and adverse to the opinion entertained by the dominion minister of justice.^l

With a view to impart to all the provincial govern-

^j Canada Sess. Pap. 1877, No. 89, pp. 202-211, 221.

^k *Ib.* pp. 108-114, 325.

^l See *post*, p. 691.

Disallow-
ance of
provincial
acts.

Notice to
local gov-
ernments
of domi-
nion de-
cisions.

ments the benefit of any decisions agreed upon by the governor-general in council, in respect to the legality or otherwise of acts passed by any provincial legislature, and to afford to the newer provinces of the dominion the advantage of the legislation and experience of the older provinces, Lieutenant-Governor Morris, of Manitoba, advised in a despatch to the secretary of state for the dominion, dated Oct. 10, 1874, that 'in the event of the disallowance of an act of a local legislature, the fact of the disallowance, together with its cause, should, in addition to the notice in the Canada gazette, be communicated to the other local governments.' Governor Morris was informed that his suggestion was regarded as one that might well be adopted in future.^m But there is now no necessity for such a course, as the department of justice has issued a return of all papers on the subject of provincial disallowance since the establishment of confederation.ⁿ

As a rule, the dominion government refrains from any interference with provincial legislation, so long as the acts passed are clearly within the competency of the local authorities; unless they contain provisions which are open to objection upon general grounds of public policy, as being calculated to affect injuriously the interests of the dominion, or of any particular portion thereof. The reason of this cautious forbearance is not far to seek.

Cautious
exercise
of right of
disallow-
ance.

Acknowledging the constitutional supremacy of the Crown, and the indisputable right of the supreme authority in every state, to supervise and control all legislation therein, according to its discretion (a principle of much importance in this connection, to be

^m Canada Sess. Pap. 1877, No. 89, p. 43. Council on subject of Provincial Legislation, 1867-1887, compiled by

ⁿ Correspondence, Reports of W. E. Hodgins, M.A., 2 vols. 8vo. Minister of Justice and Orders in Ottawa 1886-1888.

presently adverted to); bearing in mind the fact that, under the British North America act, the governor-general in council is substituted for the Queen in council, as the supreme authority entitled to ratify or disallow provincial acts—considerations which would naturally suffice to prevent the adoption of any stringent or inflexible rules for the exercise of this sovereign power on behalf of the Crown, in respect to acts passed by the provincial legislatures—we must, nevertheless, admit that the rights of local self-government heretofore conceded to the several provinces of the dominion are not, in any wise, impaired by their having entered into a federal compact, and that no infringement upon those rights which would be at variance with constitutional usage, or with the liberty of action previously enjoyed by the provinces when under the direct control of the Imperial government, would be justifiable on the part of the dominion executive.

Disallow-
ance of
provincial
acts.

We have already seen that, in the colonies entrusted with 'responsible government,' the royal veto upon legislation is now exercised only within certain prescribed or easily ascertained limits; ° and that no mere calculations of political expediency, or difference of opinion in regard to the policy of a colonial enactment, would suffice to induce the Crown to veto the same, provided only it was within the legislative competency of the colony, and did not injuriously affect the interests of other parts of the empire.

A similar restraint has been observed by the dominion government in its control over provincial legislation delegated to them by the Imperial parliament.

There is, moreover, in the case of the Canadian provinces, an additional reason for the cautious and sparing exercise of a veto, by the governor-general in council,

° See *ante*, p. 158.

Absolute
rights of
local
legisla-
tures.

upon acts passed by the provincial legislatures; namely, that under their several constitutions, and pursuant to the ninety-second section of the British North America act, these local legislatures possess powers of legislation as complete and absolute within their exclusive jurisdiction, as those enjoyed by other colonial legislatures, or by the dominion parliament, or even by the parliament of the mother country in their respective spheres. We have indeed passed from the time when the power of the colonial legislatures under an unwritten constitution was not open to dispute,^p to a time when the relative jurisdiction of a federal parliament and of a provincial legislature—like the powers of the executive and judiciary—are defined and circumscribed by a written constitution; nevertheless, within their prescribed limits, the exercise of such powers is unimpeachable.^q

Judicial
opinions
thereon.

This point was urged with much acumen by the learned judges of the court of appeal in Ontario in 1873, in adjudicating upon the constitutionality of a certain act of the local legislature, ‘to confirm the deed for the distribution of the estate of the late G. J. Goodhue.’^r Thus it was observed by Chief Justice Draper: ‘Conceding to the fullest extent that the powers of the legislature of Ontario are defined and limited by the British North America act of 1867, I conceive that, within those limitations, acts passed in the mode described by that statute are, as to the courts and people of this province, supreme.’ And by Chancellor Spragge: ‘The true principle I take shortly to be, that, under the confederation act, there has been a federal not a legislative union; that to the provincial legislature is committed the power to legislate upon a

^p See *Reg. v. Kerr*, Berton's N. Brunswick Sup. Ct. cases, 2nd ed. pp. 553–558. ton and N.-Western R. R. Co. 39 U. C. Q. B. p. 112.

^r Ontario Stats. 34 Vic. c. 99.

^q C. J. Harrison, *in re Hamil-*

range of subjects which is indeed limited, but that, within the limits prescribed, the right of legislation is absolute.' To the same effect Vice-Chancellor Strong remarked, as to the power to pass private acts of parliament affecting property, 'that the legislature have that power, in all cases where the property and rights sought to be affected are "in the province," to the same unlimited extent that the Imperial parliament have in the United Kingdom, I have not the slightest doubt.'^s

Absolute rights of local legislatures.

These judicial opinions were cited, and their authority confirmed by Vice-Chancellor Blake, in 1876, in the case of *Cowan v. Wright*.^t And the same principle was asserted by Mr. Justice Burton, in the Ontario court of appeal, in 1879, in the case of *Parsons v. Citizens' Insurance Company*.^u See also Mr. Justice Fisher's able judgment in the supreme court of New Brunswick, in 1879, in *Steadman v. Robertson*.^v To the same effect Attorney-General Mowat observed,^w 'where there is jurisdiction, the will of the legislature is omnipotent, according to British theory, and knows no superior law.'^x

But while we acknowledge the force of these conclusions, and their applicability to restrain the exercise of the veto power over provincial legislation, in respect to bills within the exclusive legislative authority of the local legislatures, there still remains in the Crown, by virtue of its authority as an essential component part of every legislative body in the empire, a reserved prerogative right of disallowance, which is capable of being exercised on all fitting occasions. The method of giving expression to this inherent and inalienable prerogative may vary according to circumstances, and in conformity with the requirements of statute law. It may be exercised, as in England, by the sovereign in person acting in council; or, as in Canada, by the representative of

Inherent power of control in the Crown.

^s *In re Goodhue*, Grant Chancery Rep. v. 19, pp. 386, 418, 452.

^t *Ib.* v. 23, p. 623.

^u Ont. App. Rep. v. 4, p. 100.

^v Pugsley Rep. v. 2, p. 593.

^w *Severn v. The Queen*, Can.

Sup. Ct. Rep. v. 2, p. 81.

^x See C. J. Robinson in 4 U. C. Q. B. p. 318; and see *Queen v. Burah*, 3 L. R. App. 904; see also C. J. Robinson in 4 U. C. Q. B. p. 318.

Exercise
of Crown
veto.

the sovereign, in her name and behalf. But, in either case, the authority is identical, and it emanates from the same source; to wit, the prerogative of the Crown. For the sovereign, as the head of the body-politic, is a constituent part of parliament; nay, more, it is in the sovereign, and not in the body which the law assigns to advise and assist him, that all legislative authority is vested by the British constitution, as the enacting clause of every act of parliament declares.⁷

The various occasions when this prerogative may be suitably invoked cannot of course be anticipated. It is not therefore possible to formulate a definition which should state explicitly the reasons that would justify the interposition by the Crown of a veto upon a colonial enactment. Suffice it to say, in answer to the objection that a power so great and indeterminate might be injuriously or unreasonably exercised, that it is subject to the same restraints that are imposed upon all other actions of the sovereign in a constitutional monarchy: it can only be exercised upon the advice, and through the instrumentality, of responsible ministers. With this limitation, the royal veto upon colonial legislation remains as a reserved power ordinarily in abeyance, but capable of being resorted to, whenever, in the judgment of the Crown and its responsible advisers, the welfare of the particular colony or province, or the interests of the nation at large, may demand the interposition of the supreme authority.⁸

Judicial
opinions
on this
subject.

Applying this doctrine to the control exercisable by the governor-general in council over provincial legislation, the judges of the supreme court of Canada have pertinently observed that there is 'no doubt' of the

⁷ In the words of the old Year Book, of 23 Edward III., 'the king makes the laws by the assent of the peers, &c., and not the peers and the

commune.' Stubbs, *Const. Hist.* v. 2, p. 572. See Stephen's *Blackstone*, book 4, c. 1.

⁸ See *ante*, p. 159.

prerogative right of the Crown to veto any provincial act, and that it 'could even be applied to a law over which the provincial legislature had complete jurisdiction. But it is precisely on account of its extraordinary and exceptional character that the exercise of this prerogative will always be a delicate matter. It will always be very difficult for the federal government to substitute its opinion instead of that of the legislative assemblies, in regard to matters within their province, without exposing themselves to be reproached with threatening the independence of the provinces;' not to dwell upon the possible consequences of a province choosing 'to re-enact a law which had been disallowed.' Moreover, the assertion of this prerogative right by the dominion government 'will always be considered a harsh exercise of power, unless in cases of great and manifest necessity, or where the act is so clearly beyond the powers of the local legislature that the propriety of interfering would at once be recognised.'^a

Practical exercise of dominion control over provincial legislation.

The precise extent wherein the governor-general in council—in fulfilment of the powers conferred upon him by the British North America act, in the supervision of provincial legislation—has disallowed acts passed in the provinces, because they were at variance with rules hereinbefore recited, and which were established to define and regulate the powers assigned to the provincial legislatures by that statute, will appear on reference to the subjoined memorandum, for which the editor is indebted to the deputy of the minister of justice of the dominion :—

The power of disallowance of provincial statutes is always exercised with caution. The dominion government has, since confederation, exercised this power in very few instances, compared to the

^a C. J. Richards and Judge 96, 131. See also C. J. Draper, Fournier, in *Severn v. The Queen*, in *re Goodhue*, 19 Grant's Ch. Rep. Canada Sup. Court Rep. v. 2, pp. 384.

Disallow-
ance of
provincial
acts.

large number of acts which, since confederation, have been passed by the several provincial legislatures.

The number of acts passed by the provinces, from confederation in 1867—or from the entry of particular provinces into the federal union—to the year 1890-91 inclusive, are as follows :—

Ontario	2,604
Quebec	2,247
New Brunswick	2,531
Nova Scotia	2,813
Manitoba (from 1870)	1,116
British Columbia (from 1871)	801
Prince Edward Island (from 1873)	484
North-west Territories (from 1878)	247
Total	12,843

And the total number disallowed, within the same period, are as follows :—

Ontario	8
Quebec	5
New Brunswick	1
Nova Scotia	6
Manitoba	24
British Columbia	20
Prince Edward Island	2
North-west Territories	4
Total	70 ^b

This is a very small percentage, and shows how reluctantly the power is exercised. It by no means follows, however, that only seventy acts have been thought objectionable by the dominion authorities. The practice has been, before taking the extreme course of disallowing an act, to call the attention of the provincial government to its objectionable features, and give them an opportunity of promoting its repeal or amendment. Occasionally, however, from the very nature of the act itself, or from the shortness of the time for disallowance, it has been thought necessary to disallow

^b The total number of acts passed by the dominion parliament from 1867 to 1890 was 2,189, of which one was disallowed, and one reserved bill did not receive royal assent. For a return of bills reserved or disallowed in the above provincial governments prior to

confederation, see *ante*, p. 173. For the same in other colonies, see *ante*, p. 158. Also Hodgins' Correspondence, Reports of Ministers of Justice and Orders in Council upon subject of Provincial Legislation, 1867-87, 2 vols. 8vo. Ottawa.

it without waiting for its repeal. Covering the period of the return many provincial acts have been objected to, and have accordingly, within the time for disallowance, either been wholly repealed or else amended so as to remove the objections.^c

Disallow-
ance of
provincial
acts.

If an act be, in its main features, clearly beyond the powers of the provincial legislature, it would seem to be the duty of the dominion authorities to disallow it; unless, within the limited time, it be repealed or so amended as to remove the objectionable features.

It is often very doubtful whether an act be within or beyond the competence of a provincial legislature; and very often acts which, in their main provisions, are clearly valid, contain some provision beyond the competence of the legislature. Moreover, in the character of the enactments which may be beyond the powers of the local body, there is often a vast difference. Though all such provisions are alike void, some of them may, without inconvenience, be passed by without interference by the dominion government; while to take the same course as to others might produce serious embarrassment and confusion. It is therefore, in each particular case, a question to be decided whether an act, though containing some void provisions, should be disallowed or left to its operation.^d

Objection has not infrequently been taken against particular provincial enactments that they would operate to the detriment or destruction of private rights; and the disallowance of such acts has been specially urged upon this ground. But this objection ought not to prevail against the deliberate intention of a legislature when, in the public interest, and for reasons of public policy, it decides to over-rule the rights of private individuals. For every legislative body in the realm is competent—within the limits of its ascertained jurisdiction—to alter, affect, or destroy pre-existing rights, providing, as it always does, or intends, though not actually bound to do, compensation to parties injuriously affected by such legislation.^e No 'legislature has the *right* to deprive a person of his property [at least without adequate recompense], but by the theory of the consti-

^c See return in Can. Sess. Pap. 1852-53, App. xx.; Stat. 16 Vic. c. 1882, No. 141.

^d See report of the minister of justice (Mr. Blake), of Dec. 22, 1875, in Canada Sess. Pap. 1877, No. 89, p. 450.

^e See Brice on Ultra Vires, ed. 1877, pt. 3, ch. x.; Browne on Compulsory Purchase, 1876; Hans. D. v. 235, p. 1295; Canadian Precedents, Can. Leg. Assem. Jour.

1852-53, App. xx.; Stat. 16 Vic. c. 39; Can. Leg. Council Jour. 1861, p. 110; Leg. Assém. Jour. 1862, Sess. Pap. No. 25; C. J. Chipman, in Berton N. Brunswick Rep. Sup. Ct. Cases, 2nd ed. p. 557; Mr. J. Gwynne in Can. Sup. Ct. Rep. v. 6, p. 73. See N. Zealand Leg. Coun. Jour. 1881, pp. 179, 192, and cases cited in Can. Hansard, 1882, p. 882.

Disallow-
ance of
provincial
acts.

tution it has the *power*. In a word, it is assumed that the legislature is the judge of the morality of its own legislation.^f It is clear, that 'the courts cannot question the authority of parliament, or assign any limits to its power,'^g a dictum which equally applies to the proceedings of colonial legislatures, when acting within the prescribed limits of their jurisdiction. Interference with existing rights is therefore a question not of power but of policy. The dominion government have occasionally interposed to disallow provincial legislation which has been complained of for this reason.^h But they have, on the other hand, refused to interfere in similar cases, where the policy of the act was disapproved, and the courts have confirmed the validity of such enactments.ⁱ

In deciding as to the disallowance of an act, the government is not confined to considering its validity in a legal point of view. The power of disallowance is a general one; and, in arriving at a conclusion as to its exercise, the government have undoubtedly the right to take into consideration other matters than those affecting merely the validity of the act. For instance, they may and should consider whether it affects Imperial or dominion interests.

The same principles (among others) would apply in deciding as to giving or withholding assent to a reserved bill. The government have, on several occasions, dealt with provincial acts [as well as with bills which have been reserved for the consideration of the governor-general in council] upon those principles.^j

^f Mr. Justice Ramsay, in *Q. B. Montreal*, in 1881. *L. J. Jurist*, v. 26, p. 13.

^g Maxwell on Statutes, p. 127. See *Imp. Stat. 35 & 36 Vic. c. 95*, directing that legal proceedings in a certain matter should be stayed by the courts. And see *ante*, p. 245. Nevertheless, a statute which deals with an existing right will be construed strictly, so as to preserve such right, if not distinctly abrogated. *Western Counties v. Windsor and Annapolis Rail. Cos. Jud. Com. P. C. L. T. N.S. v. 46*, p. 349. See *Quebec act, 1882, c. 6*, 'to remove certain disabilities arising from infringements of the Quebec Election act.'

^h The Ontario Rivers and Streams act, disallowed in May 1881, and again (upon its being re-enacted) in 1882, *Can. Sess. Pap. 1882*, No. 149.

See judgment of *Can. Sup. Ct.* concerning this act, 5 *Montreal Legal News*, p. 393. Debate in *H. of Commons, Canada*, April 14, 1882, on proposed resolutions on disallowance of provincial acts, *Can. Law Jour. v. 17*, pp. 201, 231, v. 18, p. 430.

ⁱ *B. Columbia Sess. Pap. 1881*, p. 532; *Can. Sess. Pap. 1882*, No. 141, pp. 215, 221; *Goodhue Estate act, ante*, p. 522. And see papers on disallowance of *Quebec Mining act of 1880*, *Can. Sess. Pap. 1882*, No. 75; *ib. No. 141*, p. 112. Papers requesting disallowance of *Quebec act, 1881*, *Laval University, ib. No. 72*. And see *St. Andrew's Church, Montreal, v. Board of Temporalities*, under *Dom. act of 1882*, *Legal News*, v. 6, p. 27.

^j Mr. Lash's Memorandum, dated Dec. 1879.

They have also repeatedly considered the question as to whether particular acts, though within the undoubted competency of the provincial legislatures, did not include unsound or objectionable principles of legislation, which, unless remedied by the local legislature itself, upon the recommendation of the dominion executive, might force upon the Canadian government the necessity of exercising the prerogative of disallowance. The dominion government have been chary of enforcing their own conclusions in such cases upon any provincial government ;^k nevertheless, in certain extreme cases, the governor-general in council has assumed the responsibility of disallowing provincial enactments upon this ground.¹

Disallowance of provincial acts.

In 1877, a peculiar case arose in reference to an act irregularly passed in the province of Quebec, which is deserving of special mention, as illustrating the control exercised by the dominion government in matters of provincial legislation.

Dominion government refuse to act unnecessarily.

A bill intituled 'An act to provide for the formation of joint-stock companies for the maintenance of roads and the destruction of noxious weeds,' was inadvertently assented to by the lieutenant-governor of the province of Quebec, upon a certificate that it had duly passed both houses of the legislature. It afterwards transpired that, although passed by the legislative council, it had only been read twice in the assembly. Through the mistake of the clerk, it was certified as passed without amendment, returned to the legislative council, and assented to by the lieutenant-governor. On the discovery of this mistake, the governor-general was immediately appealed to by the provincial attorney-general, with a request that he would disallow the act. But the dominion minister of justice (Mr. Blake) declined to advise this course. He reported that, in his opinion, 'the assent was void, and the bill is not an act,' and under these circumstances the power of disallowance could not properly be exercised. He pointed out that, according to precedent, an act might be passed in the ensuing session of the provincial legislature, to declare this act to be invalid ; and that, meanwhile, it was in the power of the lieutenant-governor in council to refrain from putting it into operation. This report was communicated to the Quebec government, who, concurring in the opinion that the act, having

^k See Rep. Min. of Justice on June 23, 1880, on certain B. Columbia statutes, Sess. Pap. B. C. 1881, p. 532.

¹ For precedents, see Hodgins' Disallowance of Provincial Acts, 1867-87, 2 vols. 8vo. Ottawa.

When
dominion
legislation
is *ultra*
vires.

been assented to in error, 'was but blank paper,' directed that it should not be printed amongst the statutes of the session.^m

On the other hand, the courts have been careful to maintain local rights of legislation, and to declare any acts of the dominion parliament which encroach upon such rights without express warrant from the British North America act to be *ultra vires*.

In June 1881, the Quebec court of Queen's bench, on an appeal from the decision of an inferior court, declared that the dominion parliament had exceeded its powers, in the incorporation, by act 43 Vic. c. 67, of the Bell Telephone Company. This company had been authorised to establish telephone lines in any part of Canada, to cross rivers, boundary lines, &c. But the company, in commencing a local business in Quebec, did so for purely local traffic, having no pretension to service of a dominion character. Their undertaking did not involve the connexion of service with two or more provinces, or the need even to cross navigable rivers; neither had parliament declared the company to be 'for the general advantage of Canada, or of two or more of the provinces.' In fact, the powers claimed to have been conferred were beyond the jurisdiction of the dominion parliament to grant, and should have been obtained in the particular instance from the Quebec legislature. The company were therefore adjudged to have been guilty of a nuisance, in erecting their poles in the city of Quebec without lawful authority.ⁿ But in the same month (June 1881) upon application to the Quebec legislature, then in session, an act was passed, 'to confer certain powers on the Bell Telephone Company of Canada,' which recognised this company, and gave it the necessary corporate powers for provincial work, saving only actions pending in the courts.

Similar acts were passed by the New Brunswick, the Nova Scotia, and the Ontario legislatures, in 1882. And in the same year, the dominion parliament amended their act of incorporation, and furthermore declared the works in question to be 'for the general advantage of Canada.' The judicial committee of the privy council, in November 1881, on appeal from the Canadian supreme court, in the case of the Citizens' and Queen's insurance companies, gave interpretations of No. 13 of section 92 of the British North America act assigning 'property and civil rights in the province'

^m Canada Sess. Pap. 1879, No. 26; *ib.* No. 19. Papers in the case of Lieutenant-Governor Letellier, pp. 12, 20.

ⁿ *Regina v. Mohr*, Quebec Law Rep. v. 7, p. 183; Quebec Q. B. Rep. v. 1, 384; Legal News, v. 5, p. 43.

to the exclusive control of provincial legislatures, and of No. 2 of section 91, which assigns 'the regulation of trade and commerce' to the exclusive legislative authority of the dominion parliament.

Interpretation of 'regulation of trade and commerce.'

The lords of the council considered that the words 'property' and 'civil rights' are plainly used in their largest sense, so as to embrace, in their fair and ordinary meaning, rights arising from contract, and such rights are not included in any of the enumerated classes of subjects in section 91.

On the other hand, in interpreting the words 'regulation of trade and commerce,' the collocation of this sub-section with classes of subjects of national and general concern affords an indication that regulations referring to general trade and commerce were in the mind of the Imperial legislature when conferring this power on the dominion parliament. It was in this sense that similar words were used in the act of union between England and Scotland, and in other acts of the state. They would naturally include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and probably the general regulation of trade affecting the whole dominion. But they would not confer on that parliament authority to regulate by legislation the contracts of any particular business or trade—such as the business of fire insurance—in a single province. It does not follow that because the dominion parliament has the sole right to create a corporation to carry on business throughout the dominion, that it alone has the right to regulate its contracts in each of the provinces. This as a question of property and civil rights belongs exclusively to provincial jurisdiction.^o

In respect to the North-west Territories of the dominion of Canada—which formerly did not possess representative institutions and local self-government, but were presided over by a lieutenant-governor, assisted by an executive council, both appointed by commission under the great seal of Canada—the dominion government exercised a more direct and less limited control. These territories were then governed pursuant to acts of the parliament of Canada passed from 1871 to 1877. Under the authority of these statutes all acts or ordi-

Control of legislation in territorial governments.

^o See an able *résumé* of the history and conclusions deducible from the Privy Council on this case, in Mr. Hunter's Report of Ontario Inspector of Insurance for 1881, Ont. Pap. 1882.

North-
west terri-
tories.

nances passed by the lieutenant-governor and council of the territories came into force only after they had been approved by the governor-general in council, unless in case of urgency; and the governor-general in council had the power to disallow ordinances passed in the council, at any time within two years of their enactment.^p

Thus, the act passed by the governor and council of the territories in 1873, to authorise the appointment of magistrates and coroners therein, was disallowed, although it was within the competency of the local government to enact it, because the governor-general in council considered 'that until the settlement of the country shall have reached a more advanced stage, it will be inexpedient to allow the act to go into operation.'^q

In 1880, by dominion statute 43 Vic. c. 25, the North-west Territories acts were amended, consolidated, and provision made for an elective council or assembly so soon as the country should become sufficiently populated to claim representation according to the provisions of the act. By federal statute, 51 Vic. c. 19, these provisions were repealed, the existing council abolished, and a legislative assembly granted, to consist of twenty-two elective members and three nominated legal experts—the latter to sit and debate in the chamber, but not to have a vote. An advisory council was also created to deal with matters of finance, to be chosen by the lieutenant-governor from the elected members, over which he presided. The duration of an assembly under this act has been limited to a period of three years, and the only qualification of a candidate seeking election requires that he be a naturalised British

^p Orders in Council, 1849-74, pp. 463, 494. For account of territorial system of government in United States, see *Int. Rev.* v. 6, p. 299.

^q Canada Sess. Pap. 1877, No. 89, p. 69. See further, in regard to

laws and ordinances of the local government of the North-west Territories, and the control of the dominion government over the same, *ib.* 1876, No. 70; *ib.* 1878, No. 45.

subject, any male British subject, having attained twenty-one years, being entitled to a vote—other than the unenfranchised Indian—who must be a resident in the country for a year and in the locality for three months.

North-west territories.

In 1891, by 54-55 Vic. c. 22, the North-west Territories acts were amended and further powers conferred; the number of elective members was increased to twenty-six, and the clause in the previous act empowering the nomination of legal experts repealed.

Nevertheless, the dominion government—either from motives of policy or otherwise—may shrink in the first instance from the exercise of the powers vested in them by the British North America act to disallow objectionable measures passed by the provincial legislatures. And yet certain of these measures may, in fact, be *ultra vires*, and beyond the competency of provincial authority.

Judicial decisions on limits of legislation in Canada.

The dominion government have frequently abstained from interfering with provincial acts deemed to be objectionable, with the avowed intention of leaving the objection to judicial determination.^r On the other hand, serious consequences are likely in such a case to result from this evasion of duty and responsibility, which casts upon the judiciary the obligation of declaring statutes to be void which ought never to have been permitted to become law, are aptly pointed out in Cooley's notes to Story's 'Commentaries on the United States Constitution,' 4th edition, vol. ii. p. 384.

In such a contingency, as we have already seen, it is the right and duty of any court of law within the province, to entertain and decide upon the validity of the particular statute, or provision in a statute, which has been impeached.^s The judgment of the court upon this question is, of course, open to appeal, and liable to be reviewed and annulled by a court of superior jurisdiction, whose decision likewise may be examined and adjudi-

^r Such abstention is justified by See Can. Hansard, 1882, p. 912.
Mr. Blake on grounds of public policy. ^s See *ante*, pp. 302, 336.

cated upon, either by the supreme court of the dominion, or by the judicial committee of the privy council in England.

By this process, a final and authoritative decision can be obtained, in respect to the legality of any provincial enactment, from the highest legal tribunal in the empire. And, if the decision should be adverse, the statute in question would become void and of none effect. This valuable safeguard against the unlawful exercise of the powers of provincial legislatures is always available, and recourse can be had to it by all parties who consider themselves aggrieved by any provincial statute, and who are of opinion that the same was invalid.

Establish-
ment of
dominion
Supreme
Court.

As an indispensable adjunct to the great Imperial measure which joined the British provinces in North America in federal union, the dominion parliament was empowered by the one hundred and first section of the British North America Act to 'provide for the constitution, maintenance, and organisation of a general Court of Appeal for Canada.' This intention of the Imperial Parliament was not carried out until 1875, when an Act was passed for the establishment of a Supreme Court for the dominion, which should serve as a court of appeal from the provincial courts.[†] An Exchequer Court was also created possessing original jurisdiction in revenue causes, and other cases in which the Crown is interested, the judges of the Supreme Court being appointed judges of the Exchequer Court, any one judge sitting alone constituting the court. In 1876, further jurisdiction was conferred upon this latter court for the trial of suits against the Crown in Canada by petition of right.[‡] The constitution of the Exchequer Court has since been altered and its jurisdic-

[†] On this point see Can. Law T. Court of Canada, pp. ix. x. See v. 3, p. 343, McLaren v. Caldwell. *ante*, p. 308.

[‡] Cassels's Practice Supreme

tion extensively enlarged, the Supreme Court jurisdiction remaining strictly appellate, and the original jurisdiction of the Exchequer given to a judge appointed specially for this court by statute 50 & 51 Vict. c. 16.

Supreme
Court of
Canada.

By the Supreme Court Act of 1875 the Governor in Council is empowered to refer any matters whatsoever to the court for hearing or consideration; and the judges are required to examine and report upon any private bill, or petition for the same, that may be referred to them by the Senate or House of Commons of the dominion. And by the Act 54 & 55 Vict. c. 25, the power was greatly enlarged of reference to the court for opinion of the judges; and important questions of law or fact touching provincial legislation, appellate jurisdiction relating to educational matters, constitutionality of any legislation of Parliament of Canada, 'or touching any other matter with reference to which he sees fit to exercise this power, may be referred by the Governor in Council to the Supreme Court for hearing or consideration.'

In 1876 a bill to incorporate the Christian Brothers as a company of teachers for the dominion was referred by the Senate for the opinion of the judges of the Supreme Court, and was reported by them to be *ultra vires* of the federal parliament, as infringing upon the exclusive control over education which, by the ninety-third section of the British North America Act, is vested in the provincial legislatures.^v

Questions
referred
to the
Supreme
Court for
opinion.

[By the fifty-fifth rule of the Senate, which is based upon the fifty-third section of the Supreme Court Act, authority is given at any time before the final passing of a private bill for the same to be referred, by order of the House, to the Supreme Court, to examine and report thereon upon any matter on which the Senate desires to be informed.]

In 1882 the Quebec Timber Company, already incorporated by imperial authority for the purpose of their business in the United Kingdom, applied for corporate powers from the dominion parliament to enable them to carry on their business throughout the

^v Senate Jls. 1876, pp. 155, 206. See 4 Sup. Ct. Rep. p. 311.

Questions referred to the Supreme Court for opinion.

dominion. The Senate desired to know whether the imperial incorporation sufficed ; and, if so, whether Canadian legislation was permissible. The court declined to answer the first part of this question, on the ground that the point might come before them for consideration judicially in a contested case.^w But they affirmed the right of the dominion parliament to incorporate this company for dominion objects. They also stated that these objects were of dominion and not merely of provincial concern, so that the bill was within the dominion jurisdiction, and out of the exclusive jurisdiction of the Quebec legislature.^x

In May 1882 the Supreme Court judges, in giving their opinion for the information of the Senate in regard to the competency of the dominion parliament to grant an act of incorporation to 'The Canada Provident Association,' which purposed to carry on business throughout the whole dominion, declined to express an opinion upon certain particular clauses of the bill until 'the matter should be argued before the court.'^y

[It seems clear that while trading companies, incorporated either under imperial authority or by dominion statute, have a status in all parts of the dominion, yet that the jurisdiction so conferred is practically limited to the act of incorporation.^z In carrying on their business all such companies are subject to the control of the local legislature which has jurisdiction over 'property and civil rights.'^a]

It is also provided, by the Supreme Court Act, that when the legislature of any province in Canada shall have passed an act agreeing to the exercise by the Supreme Court of jurisdiction in controversies between the dominion and any such province, or between any two or more provinces, or in suits wherein the question of the validity of a dominion or provincial statute is material to the decision thereof, then the Supreme Court shall exercise jurisdiction in regard to such

^w On this point see *ante*, p. 220.

^x Canada Senate Minutes, 1882. pp. 214, 244.

^y *Ib.* p. 482.

^z See Can. Stat. 37 Vict. c. 49, in relation to companies and institutions incorporated without the limits of Canada. See the Telegraph

Case, C. P. R. Ry. Co. v. The Western Union Tel. Co. 17 Sup. Ct. Rep. p. 151.

^a See Inspector Hunter's Summary of the effect of the Privy Council Judgment in 1881 on Canada Insurance Companies Act, Ont. Sess. Pap. 1882, pp. 6-17.

matters. The legislature of Ontario, by an act passed in 1877 (40 Vict. c. 5), authorised and confirmed such references to the Supreme Court on behalf of the province of Ontario.

Supreme
Court
jurisdic-
tion.

A similar act was passed in Nova Scotia in 1879, c. 2, and by British Columbia in 1881, c. 6, but amended in 1882 by statute c. 2. Note also Quebec statutes 1882, c. 4, and Ontario Act, 46 Vict. c. 6, requiring notice to be given to the dominion minister of justice and the provincial Attorney-General, that they may appear and be heard before any court pronounces upon the validity of any dominion or provincial statute. When the validity of any such statute is called in question before the Supreme Court of Canada, the practice of that Court is to require notice to be given to the Attorney-General of the province or of the dominion, as the case may require.^b

Herein consists the peculiar value and importance of a Supreme Court in a colony or dominion wherein a federal government has been established. Such a tribunal is available for the determination of all legal controversies between the supreme and the local authorities, and especially of questions resulting from the exercise of the legislative power, whether by the federal or provincial legislatures. It is the very crown and counterpoise of all authority entrusted to subordinate governments by imperial law, and it affords a constitutional method of ascertaining the proper bounds and limitations as well of provincial as of federal rights. It is the truest and most effectual safeguard of the people against the abuse of powers, either on the part of the greater or lesser body upon which jurisdiction has been conferred. Independent of party conflicts, and superior to the corrupt influences by which all legislatures are liable to be assailed, a Supreme Court conveys an element of stability and of respect for the supremacy of law not otherwise attainable in political institutions. It

Import-
ance of a
dominion
Supreme
Court.

^b Can. Stat. 54 & 55 Vict. ch. 25, sec. 37, § 3.

Supreme
Court of
Canada.

is likewise a guarantee for the impartial administration of justice, and for the maintenance of sound principles of government, without which popular institutions would easily degenerate into an instrument of oppression. Such advantages have already accompanied the establishment of a Supreme Court for the dominion of Canada. Since the creation of this court, it has already determined several weighty and intricate questions of constitutional law, wherein a conflict of opinion and of powers had arisen between the local and the federal authorities.^c

Its valuable
decisions on
constitutional
questions.

For example, mention may here be made of several important decisions of the Supreme Court—in addition to the cases cited in the note to the preceding paragraph—one of which disposes of the question of the validity of a provincial enactment, and the other confirms a statute passed by the dominion parliament, which had occasioned much litigation, and had been adjudicated upon, in contrary ways, by several provincial courts.

On domi-
nion law
for trying
election
petitions.

In January 1879 the Superior Court of the province of Quebec decided that the dominion controverted Elections Act of 1874, which imposed certain duties upon the judges of that court for the trial of election petitions against the return of members elected to serve in the dominion House of Commons, was within the competency of the dominion parliament, under the British North America Act, 1867; notwithstanding that, by the ninety-second section of this act, 'exclusive powers' are conferred upon the provincial legislatures to make laws respecting 'the administration of justice' in the respective provinces, 'including the constitution, maintenance, and organisation of provincial courts, both of civil and of criminal jurisdiction.'

This court held that, while the dominion parliament could not alter the 'constitution' of provincial courts, or enlarge their powers, even for the purpose of enabling them to try election petitions, as aforesaid, yet that these courts were already competent to undertake such duty, as they possessed civil jurisdiction to try and determine

^c See especially the judgment on the question of queen's counsel, *ante*, p. 336; the judgment on the powers of local legislatures, *post*, p. 691; the judgment on clerical interference at elections, *ante*, p. 425,

the judgment of the validity of the Canada Temperance Act, *post*, p. 549, and the judgment noted in Dominion Liquor License Case, *post*, pp. 549-555.

'all civil matters' arising within the province. And inasmuch as the dominion parliament was undoubtedly competent, by the express authority of the Imperial act, to create a new Court for the trial of controverted elections (a privilege of which it had actually availed itself by an act passed in 1873, and since repealed) it was equally empowered, instead thereof, at its discretion, to assign to the judges of existing courts judicial duties for the determination of such questions, the same not being inconsistent with their primary and ordinary functions, but rather being services which they were specially qualified to render on behalf of the dominion.^d

Constitutional
decisions.
—
Election
petitions.

This doctrine had previously been affirmed by the Ontario Court of Common Pleas, in December 1878, the judges unanimously agreeing that the Election Trials Act of 1874 was binding upon them.^e It was also approved by the Court of Review at Montreal, in 1875, in two distinct cases.^f An elaborate judgment to the same effect was rendered by the Quebec Provincial Court at St. Hyacinthe and Sorel. On a motion to appeal therefrom, made before the Court of Appeals at Montreal, as also upon other similar occasions, Chief Justice Sir A. A. Dorion vindicated the right of the dominion parliament to impose the duty of trying federal election petitions upon provincial courts. He asserted that the dominion parliament, when legislating upon matters within its jurisdiction, could impose duties upon any subjects of the Queen in the dominion, whether they were officials of provincial courts, other officials, or private citizens.^g

The validity of the dominion Election Trials Act of 1874 was thus confirmed by the weight of judicial authority. But inasmuch as decisions to the contrary effect had been given by several learned judges, the question was appropriately submitted to the consideration of the Supreme Court of the dominion, upon an appeal from

Validity
of domi-
nion Elec-
tion Trials
Act.

^d Chief Justice Meredith, in *Langlois et al. v. Valin*. It should be stated, however, that in three other actions brought before the Superior Court at Quebec, in January 1879, wherein the same question was substantially raised, two decisions, adverse to the constitutionality of the dominion statute were rendered by different judges, and but one confirming the law as explained by C. J. Meredith. *Bélangier et al. v. Caron*; *Dubuc et al. v. Vallée*; *Guay et al. v. Blanchet*, Quebec Law Rep. v. 5, Nos. 1 and 2.

In April 1879 Judge McCord, in the Superior Court of Montmagny, likewise gave judgment against the dominion statute. *Ib. v. 5*, p. 191.

^e Ontario Com. Pleas Rep. v. 29, p. 261.

^f Lower Can. Jur. v. 20, pp. 77, 86.

^g *Bruneau v. Massue*, L. C. Jurist, v. 23, p. 60. The same point arose in other cases before the Court of Appeal, which were not reported; but the decisions uniformly sustained the judgment of the court, as rendered by Chief Justice Dorion.

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petitions.

the judgment of Chief Justice Meredith in the case of *Valin v. Langlois*.

On Oct. 28, 1879, the Supreme Court, in judgments delivered by all the judges present, unanimously agreed to dismiss the appeal with costs, thereby confirming the constitutionality of the dominion statute, upon grounds equally applicable to all the provinces.

The court were of opinion that, under the British North America Act, the exclusive legislative power of the provincial assemblies was limited and confined to the subjects specifically assigned to them. And that all other powers of legislation for the welfare and good government of the dominion, including what is specially assigned to the dominion parliament, but not so as to restrict the generality of the supreme authority conferred upon the same by the Imperial statute, were expressly and exclusively conferred upon the Parliament of Canada. In fact, the authority of the federal power over the matters left under its control is exclusive, full, and absolute; but with regard to the matters embraced in sub-section 16 of section 92, left to the provincial legislatures, their authority cannot be construed as being similarly full and exclusive, when, by such construction, the federal power over matters specially left under its control would be lessened, restrained, or impaired.

That, in matters which concern the election of their members, the dominion House of Commons had undoubted and exclusive jurisdiction. It was therefore competent to parliament to transfer to the civil tribunals in the several provinces, having superior original jurisdiction, cognisance of all rights arising out of election petitions; and that in so doing there was no invasion or encroachment whatever upon the rights of local legislatures. And that, inasmuch as parliament may transfer such cognisance absolutely, it may do so qualifiedly or *sub modo*, by defining the mode in which the cognisance shall be exercised; which, by prescribing the mode of procedure, is what was actually done. Neither is such prescribing of the mode of procedure an encroachment upon the rights of the local legislatures; for the fourteenth sub-section of the ninety-second section of the British North America Act must plainly be read as conferring upon the local legislatures the right to prescribe procedure only in such civil matters as were, by the preceding sub-section, placed under their exclusive control.

That the dominion parliament is at liberty either to create new courts, when public necessity may require it, for the better administration of the laws of Canada; or to assign to the jurisdiction of existing courts any further matters appropriate to their sphere of duty. For, when legislating within its proper bounds, the dominion parliament is clearly competent to require existing courts,

in the respective provinces, and the judges of the same, who are appointed by the dominion, paid by the dominion, and removable only by address from the dominion parliament, to enforce their legislation. Such an exercise of authority constitutes no invasion of the rights of the local legislatures.

Constitutional
decisions.
—
Legis-
lative
powers.

That the exclusive power of the local legislatures to make laws in relation to 'property and civil rights in the province' must necessarily be read in a restricted and limited sense; because many matters which directly involve property and civil rights are legitimately and without question affected, controlled, and guarded by dominion legislation. The competency of the local legislatures to make laws respecting civil rights is confined to those 'civil rights' which are not affected by dominion powers of legislation, and do not come within the scope of the same. Moreover, it is expressly provided, in the ninety-first section of the British North America Act, that any matter coming within any of the classes of subjects assigned to the exclusive authority of the dominion parliament shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the subjects assigned by this act to the exclusive legislative authority of the provinces.^b

It is provided by section 94 of the British North America Act that if the dominion parliament desire uniform legislation in 'any of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick . . . any Act of the Parliament of Canada making provision for such uniformity shall not have effect in any province unless and until it is adopted and enacted as law by the legislature thereof.'

By section 26 § 3 of chapter 135 of the Revised Statutes of Canada

^b Canada Supreme Court Rep. v. 3, pp. 1-101; judgments delivered on Oct. 28, 1879, by Chief Justice Ritchie, and by Judges Fournier, Henry, Taschereau, and Gwynne. On Dec. 13, 1879, the Judicial Committee of the Privy Council refused leave to appeal against this decision, on the ground that their lordships 'entertain no doubt' that the decision was correct (L. T. Rep. N. S. v. 41, p. 662; 5 L. R. App. 115). A similar interpretation of the British North America Act is contained in the masterly judgment of Mr. Justice Palmer in the case of *The Queen v. The Mayor, &c. of Fredericton*; Pugsley & Burbidge,

N. B. Rep. v. 3, p. 146. Although the court decided against Judge Palmer's views, his opinion, as has been already stated, was sustained on appeal by the dominion Supreme Court in 1880, and the validity of the Canada Temperance Act of 1878 confirmed (see *post*, p. 549). See also *Wilson in Crombie v. Jackson*, 34 U. C. Q. B. Rep. p. 579; and *Peek v. Shields*, 31 U. C. C. P. p. 112; and *Doyle v. Bell*, 32 U. C. C. P. Rep. p. 632; and judgment of Privy Council in *Cushing v. Dupuy*, 5 L. R. App. p. 409. See other cases cited in *Doutre*, Const. of Canada, p. 318.

Constitutional
decisions.

Legislative
powers.

the Supreme Court of Canada, or a judge of that court, may permit an appeal direct to the Supreme Court of Canada, without any intermediate appeal being had to the provincial Court of Appeal, other than from the province of Quebec.

'With respect to the finality of the decision of the Supreme Court, it has been decided by the Judicial Committee that no appeal in a controverted election case will be entertained by the Privy Council.'¹

The following precedents will further explain the circumstances under which provincial as well as dominion enactments have been reviewed by Canadian courts, and when appealed, by the Judicial Committee of the Privy Council, since confederation :

Benefit
society.

In November, 1870, the Circuit Court of Montreal decided that an act passed by the Quebec legislature, to extend the powers of a benefit society, called 'The Union St. Jacques of Montreal,' so as to save them from financial embarrassment, was unconstitutional and void, inasmuch as it trenched upon powers, in relation to bankruptcy and insolvency, exclusively reserved, by the British North America Act, 1867, to the dominion parliament. This judgment was affirmed by the Court of Queen's Bench for the province of Quebec. But on July 8, 1874, the Judicial Committee of the Privy Council reversed this decision, and declared the act in question, as dealing with a 'matter of a merely local or private' concern, to be within the competence of the provincial legislature.¹

Liquidation
of a
society.

On the other hand, in February, 1880, the Court of Queen's Bench at Montreal decided that the Dominion Act, 42 Vict. c. 48—respecting liquidation of affairs of Building Societies—was *ultra vires*. This act was not in the nature of an insolvency law, as it applies to all such societies, solvent or otherwise. It therefore came

¹ Cassels's Supreme Court Prac. p. 86. 59 L. T. N. S. p. 279.

¹ Quebec Stat. 33 Vict. c. 58. L. Can. Jurist, v. 15, p. 212. P. C. App. v. 6, p. 31. L. T. Rep. N. S. v. 31, p. 111. The same point was raised in *Dow v. Black*; wherein the judicial committee decided that a New Brunswick statute, empowering majority of inhabitants of a parish to raise, by local taxation, subsidy in aid of construction of a railway which had been declared by

the provincial Supreme Court to be void, as being in excess of the powers vested in the provincial legislature by the Imperial Act, was within the competency of that legislature, because it related to a local matter within the province. (P. C. App. v. 6, p. 272.) See other decisions upon insolvency legislation, cited in *Doutre*, Const. of Canada, p. 174, also Russell & Chesley, N. S. Sup. Ct. Rep. v. 1, p. 137; *Crombie v. Jackson*, 34 U. C. Q. B. p. 575.

within the limit of 'civil rights,' assignable, by the British North America Act, to the exclusive jurisdiction of the provincial legislatures.^k

Constitutional decisions.

In 1871, the Ontario Court of Queen's Bench confirmed the validity of an act of the provincial legislature, passed to regulate tavern and shop licenses, which imposed the penalty of imprisonment for infringing the provisions of the same. Exception had been taken to this act, that it created a crime, and so encroached on the powers of the dominion parliament to legislate exclusively on 'the criminal law.' But the court decided that the provision to which exception was taken was justified by the 15th sub-section of section 92 of the British North America Act, which empowered the local legislatures to enforce any law they were competent to enact by 'the imposition of punishment by fine, penalty, or imprisonment.'¹ But in a *subsequent* case (which was reversed on appeal) the same court decided that inasmuch as the 'local legislature has no general or plenary power of legislating on criminal law, or *quasi* criminal matters involving corporal punishment, but only the restricted and limited jurisdiction allowed by the Confederation Act,' the power to award imprisonment for infraction of any provincial law did not include the power to add to the sentence the further penalty of 'with hard labour,' as this would be in excess of the powers of the provincial legislatures under the British North America Act.^m It was further decided, by the same court, that even in matters within its competency the local legislature has no power to delegate its authority, and enable a board or any other authority outside their own assembly to make regulations, create offences, and annex penalties for their infraction.ⁿ This it will be seen was upon the assumption that the powers exercised by the provincial legislature were by grant or delegation. But both these decisions (i.e. *Regina v. Hodge* and *Regina v. Frawley*) were reversed on appeal by the Ontario Court of Appeal, and it was held that the provincial legislature had power to delegate its authority to the License Commissioners, i.e. certain powers in order to the carrying out of its own legislation upon particular subjects; and that the provincial legislature could impose the punishment of hard labour in addition to imprisonment.^o This doctrine was thus enunciated by the judicial

Liquor licenses.

^k 3 Legal News, p. 61.

¹ *Regina v. Boardman*, 30 U. C. Q. B. 555. *Regina v. Howard*, *ib.* v. 45, p. 346. For other cases defining limits of provincial and dominion legislation in relation to punishment of crimes, &c., see Doutre, *Const. of Canada*, p. 320.

^m *Regina v. Frawley*, U. C. Q. B. v. 46, p. 153.

ⁿ *Regina v. Hodge*, *ib.* v. 46, p. 141.

^o *Ontario App. v. 7*, p. 246. See also *Roberts v. Climie*, U. C. Q. B. v. 46, p. 264.

Constitutional
decisions.

Liquor
licenses¹

committee of the privy council in the case of *The Queen v. Burah*. 'The Indian legislature has powers expressly limited by the act of the Imperial parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of parliament itself.'^p The judgment was thus affirmed by the Lords of the Privy Council in *Hodge v. The Queen*. 'The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into his (its) own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them are matters for each legislature, and not for courts of law, to decide.' 'Under these very general terms, "the imposition of punishment by imprisonment for enforcing any law," it seems to their lordships that there is imported an authority to add to the confinement or restraint in prison that which is generally incident to it—"hard labour"; in other words, that "imprisonment" there means restraint by confinement in a prison, with or without its usual accompaniment, "hard labour."^q Powers granted by a local legislature to a municipality to make by-laws must be construed strictly, and cannot be exercised so as to discriminate between different persons or classes of individuals at the mere discretion of the municipality.^r

On taxing
powers
of local
legisla-
tures.

In January, 1878, the dominion Supreme Court decided, on an appeal from a judgment of the Ontario Court of Queen's Bench, that the act of the Ontario legislature (37 Vict. c. 32) requiring brewers to take out a license for the sale of fermented or malt liquors by *wholesale*, was not within the competency of a provincial legislature; that the power to tax and regulate the trade of a brewer, being a matter of excise, and the raising of money by 'taxation,' as well as for the restraint and 'regulation of trade and commerce,' is comprised within the class of subjects reserved, by the ninety-first section of the British North America Act, to the

^p 3 L. R. App. p. 904.

^r *Jonas v. Gilbert*, Can. Sup. Ct.

^q *Hodge v. The Queen*, 9 L. R. Rep. v. 5, p. 356.
App. pp. 132, 133.

exclusive legislative authority of the dominion parliament; and that the license imposed by the said provincial statute was a restraint and regulation of trade, and not an exercise of municipal or police power. Under the ninety-second section of the Imperial Act, local legislatures are empowered to deal exclusively with such licenses only as are of a local or municipal description. The taxing power of a provincial legislature (as has been affirmed by the Judicial Committee of the Privy Council, in a case already referred to^s), is confined to direct taxation, in order to raise a provincial revenue; and to the grant of licenses to shops, saloons, taverns, auctioneers, and 'other licenses,' for purely municipal and local objects, for the purpose likewise of raising a revenue for provincial, local, or municipal purposes.^t Moreover, this taxing power of the local government must not be exercised so as to encroach upon, or to conflict with, the taxation in aid of dominion revenue, which is authorised to be exclusively imposed by the federal parliament.^u

Constitutional decisions.

In October, 1879, the Supreme Court of New Brunswick gave an opinion adverse to the constitutionality of the Canada Temperance Act of 1878, one of the judges (Palmer) dissenting.^v But upon this question so much diversity of opinion prevailed that it was submitted on appeal to the Supreme Court of the dominion, as the appropriate tribunal for finally adjudicating upon the legality of legislation passed either by dominion or provincial authority. In April, 1880, the court decided that legislation on this question—being *ultra vires* of the provincial legislatures, because dealing with a subject not 'exclusively' assigned to provincial control^w—was clearly within the jurisdiction of the dominion parliament; that it was, in fact, a competent 'regulation of trade and commerce' under sub-section 2 of the British North America Act of 1867, section 91; and also that by virtue of the Imperial Act aforesaid, the dominion parliament possesses plenary powers of legislation over all matters within the scope of its jurisdiction, which powers may be exercised

Canada Temperance Act.

^s Att.-Gen. for Quebec *v.* The Queen Insurance Co., 3 L. R. App. 1090. See *post*, p. 557.

^t *Severn v. Regina*, Can. Sup. Ct. Rep. v. 2, pp. 70, 88, 97. See the decisions in N. Brunswick to same effect, *post*, p. 556. See also *Regina v. Taylor*, 36 U. C. Q. B. p. 183; *City of Fredericton v. The Queen*, 3 Sup. Ct. Rep. 505; *Russell v. The Queen*, 7 L. R. App. 829; *Hodge v. The Queen*, 9 L. R. App. 117.

^u 2 Can. Sup. Ct. Rep. Judge Fournier, pp. 130-133. Judge Henry, pp. 136-140.

^v *Pugsley & Burbidge, N. B.* Rep. v. 3, p. 139.

^w The Courts in Quebec have repeatedly held that the local legislatures had no power to pass a prohibitory liquor law. See cases cited in Can. Sup. Ct. Rep. 3, p. 517. The New Brunswick Supreme Court has given a similar decision. *Ib.* p. 543.

Constitutional
decisions.

Temper-
ance.

either absolutely or conditionally, and may be enforced in particular districts of the dominion and not in others, at the discretion of parliament.^x

On June 23, 1882, the Judicial Committee of the Privy Council, reviewing in effect the decision of the dominion Supreme Court, upon the validity of the Canada Temperance Act of 1878, confirmed that judgment, and declared that permissive statute to be within the powers of the dominion parliament.^y The Judicial Committee, however, were careful not to affirm that the dominion parliament had *alone* the power to pass a prohibitory liquor law. It would appear from later cases that the right possessed, under the provincial laws, before and after confederation, for the government of municipalities, warranted corporations, in particular cities and towns, in passing by-laws to regulate or prohibit the sale of intoxicating liquors, in aid of the preservation of good order in such municipalities. It is equally clear that the power to regulate the issue of licenses, in order to raise revenue for provincial purposes, appertains to the local legislatures. If this principle be maintained, it affords another instance of the existence of concurrent legislation in provincial and dominion authorities under the British North America Act.^z If a local legislature should unduly exercise its lawful powers in a particular instance, the remedy must be sought in the exercise by the central government of the constitutional right of disallowance. On the other hand, it must be remembered that it is within the exclusive right of the dominion parliament to promote temperance by means of a uniform law throughout the dominion; and it is questionable whether this right may be interfered with by any provincial legislation.^a Provincial license laws have been objected to by the dominion government on this ground,^b but the point has not been always insisted upon.

Dominion
liquor
license
case.

In 1883 the dominion parliament passed an act respecting the sale of intoxicating liquors (46 Vic. c. 30), and an amendment to the same in the following year (47 Vic. c. 32), as a measure to promote temperance for the benefit of the whole country.

This legislation empowered the dominion government to appoint a board of commissioners and inspectors for the supervision and

^x 3 Can. Sup. Ct. Rep. p. 505.

^y Russell v. The Queen, 7 L. R. App. p. 829; 46 L. T. Rep. N. S. p. 889.

^z Corporation of Three Rivers v. Sulte, 5 Legal News, p. 331. See also Poulin v. City of Quebec, 7 Quebec L. Rep. p. 337; 6 Leg. News,

p. 214; 11 Can. Sup. Ct. Rep. p. 25; Dion v. Chauveau, 9 Quebec L. Rep. p. 220.

^a Russell v. The Queen, 7 L. R. App. p. 841.

^b Can. Sess. Pap. 1882, No. 141, pp. 3, 4, 11, 17, 19, 21, 26, 145, 184.

issue of licenses, limiting the right of sale of liquor throughout the country to holders thereof. These acts sought to accomplish the purpose of restriction of sale, in districts not favourable to absolute prohibition—obtainable under the existing Canada Temperance Act of 1878—by enabling inhabitants of a locality to veto any particular license, also limiting the number of places where sold, and in permitting smaller districts to effect a similar prohibition to that which larger districts could obtain under the act of 1878.

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Dominion liquor license case.

Doubts having arisen as to the competence of the dominion parliament to pass such legislation, the acts were thus referred by 47 Vic. c. 32, sec. 26, to the supreme court of Canada for an opinion on their validity :

1. Question. Are the following acts in whole or in part within the legislative authority of the parliament of Canada, namely :

(1) The Liquor License Act, 1883 ;

(2) An act to amend the Liquor License Act, 1883 ?

2. Question. If the court is of opinion that a part or parts only of said acts are within the legislative authority of the parliament of Canada, what part or parts of said acts are so within such legislative authority ?

The case was argued before the court, several of the provinces being represented by counsel as contestants.

In answer to the questions submitted for determination the court pronounced both acts *ultra vires* of the legislative authority of the parliament of Canada, except in so far as the said acts respectively purport to legislate respecting those licenses mentioned in section seven of the said 'Liquor License Act, 1883,' which are there denominated vessel licenses and wholesale licenses, and except also in so far as the acts respectively relate to the carrying into effect of the provisions of the 'Canada Temperance Act, 1878.'^c

By petition of the governor-general, the question was then referred to the judicial committee of the privy council. Accordingly, the dominion parliament passed an act (48 & 49 Vic. c. 74) suspending such portions of the Liquor License acts as had been declared *ultra vires* by the supreme court, pending the decision of the privy council.

On November 11, 1885, the case came before the committee, and it was contended by counsel for the dominion^d that in effect

^c Prior to 1891 the supreme court followed the practice of the judicial committee of the privy council in dealing with cases submitted for consideration, in certifying merely an opinion, without assigning reasons for conclusion, as

when on appeal. This practice is now altered by 54 & 55 Vic. c. 25, sec. 4, requiring the court to give reasons in like manner as in case of judgment upon an appeal.

^d Sir Farrer, now Baron, Herschell.

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the acts did not interfere with the rights of the provincial legislature, in the issue of licenses for the purpose of raising revenue. For by their provisions the money derived from licenses was not for dominion revenue, but to be used only to cover expenses of the board of commissioners and inspectors ; as it was required that any surplus had to be paid over to the revenues of the province where collected, thus not interfering with provincial rights. That in determining the question whether any matter is a subject within the exclusive jurisdiction of the province, the proper course is first to look at section ninety-two of the British North America act, and see whether it comes within any of the clauses enumerated there. Should it not do so, then there is an end of the contention that it is within the exclusive legislation of the province. But even if it be found in section ninety-two reference must be made to section ninety-one, and if there also, then so far section ninety-one overrides and limits section ninety-two. That if the acts under consideration, as a general regulation of the traffic in intoxicating liquors throughout the dominion, fell within the class of subjects 'the regulation of trade and commerce,' it would not signify if it did or did not come within section ninety-two. There being nothing in section ninety-two exclusively committed to the provincial legislature, which precludes this action of the dominion parliament from dealing with intemperance as an evil affecting the dominion at large, in restricting the sale of intoxicating liquors, and making them subject to conditions calculated to limit their sale, by means of these acts, purporting to deal with the whole dominion through a uniform law. That sections ninety-one and ninety-two are not mutually exclusive ; section ninety-one overriding ninety-two. That section ninety-one does not exclusively commit to the provincial legislatures all the regulations and limitations of the liquor traffic in their provinces as established conclusively by decision in *Russell v. The Queen*. That no one of the subheads of section ninety-two points specifically, clearly or distinctly, to any dealing with regulation of trade, other than for the 'raising of a revenue ;' while assuming that every regulation of trade and commerce would not necessarily be within section ninety-one, yet the dominion government had the power in the matter of regulation of trade, having for its object the peace, order, and good government of the country. That whatever limitation is put on the regulation of trade and commerce, it should not be of such a character as to exclude from the power of the dominion parliament any law relating to trade and commerce which it considers necessary for the peace, order, and good government of the country.

The counsel for the provincial governments^e claimed that the acts were precisely similar in character and nature; concurrent and identical in legislation with the Ontario Liquor License Act of 1877, in question in *Hodge v. The Queen*, which had been declared to be within the exclusive legislative functions of the province. He argued that "the ninety-first section gives power for the Queen, with the advice and consent of the senate and house of commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces," and, therefore, if the act in question is a matter which is assigned exclusively to the legislatures of the provinces, that is to say, if it comes within section ninety-two, then the dominion parliament cannot, under those general words of "making laws for peace, order, and good government," make any law in respect of that matter. But all the enumerated matters in section ninety-one are subject to those words, in relation to all matters not coming within "the classes of subjects by this act assigned exclusively to the legislatures of the province," the whole section being governed by these words. And that the enumerated articles in section ninety-one are only an illustration inserted for greater certainty, but that those words to which I referred govern the whole of the section, and therefore if, for example, they make regulations as to trade or commerce, they must make such regulations as will not infringe upon the exclusive power of legislation over the matters mentioned in section ninety-two, and that the regulations made under the powers given by section ninety-one must be such as do not interfere with the exclusive jurisdiction given to the legislatures of the provinces by section ninety-two. How are those enumerated articles in section ninety-one introduced? "And for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that, notwithstanding anything in this act, the exclusive legislative authority of the parliament of Canada extends to all matters coming within the classes of subjects next hereafter enumerated;" that is to say that the enumerated articles are inserted for greater certainty, showing what is included in "peace, order, and good government of Canada." But the whole section is governed by the words, in relation to all matters not coming within the classes of subjects exclusively given to the provincial legislatures.

'Then, coming to the last words of section ninety-one, "And any matter coming within any of the classes of subjects enumerated in

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^e Mr., now Sir Horace, Davey.

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this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this act assigned exclusively to the legislature of the provinces." I understand those words to mean—and I submit the true construction and bearing of them is this—that the legislatures of the provinces cannot legislate on any of the enumerated matters for their own provinces under the pretence or under the contention that the legislation is of a provincial or local character. To give an illustration of what is meant, "bankruptcy and insolvency" is one of the matters. It is number twenty-one. I should admit that the provincial legislature, the legislature of Ontario, could not pass a bankruptcy act for the province of Ontario on the allegation or suggestion that it was of a local character confined only to the province; that that is a class of subjects upon which the dominion parliament has the exclusive jurisdiction, and that this section was intended to prevent the legislatures of the provinces legislating on matters included in section ninety-one, on the mere suggestion that the legislation was of a local character confined only to the province, and that, I venture to submit, is the meaning of those words. But, on the other hand, it is equally true that the dominion parliament cannot legislate on matters which are included in section ninety-two on the suggestion or contention that the legislation is for the whole of Canada. If I can show that the matter is exclusively assigned to the provincial legislatures by section ninety-two, then the dominion parliament has no jurisdiction to legislate on those matters on the suggestion that they pass a general act which is applicable, not only to the provinces, but also to the whole of Canada. To take an illustration in the same way—"property and civil rights in the province"—I apprehend it would not be competent for the parliament of Canada to pass a general act applicable to the whole of the dominion, to say that real estate, for example, shall vest in the executors of deceased persons instead of the next heir, on the mere suggestion that that was an act which was applicable to the whole of the dominion. . . . That the jurisdiction to legislate for the peace and order of Canada is subject to the exception of those matters which are exclusively confined to the legislatures of the province. That under the guise of passing a general act for the whole of Canada it attempts to legislate by the creation of what may be called local and municipal licensing bodies, giving them restricted local jurisdiction, and those matters are exclusively given to provincial legislatures. You must give a construction of these large words, "the regulation of trade and commerce," which shall not be inconsistent with the legislative powers which are exclusively given to the provincial legislature under section ninety-

one . . . and to say that they do not include the authority to make local regulations and enforce minute local regulations of particular trades by means of local bodies.' Constitutional decisions.

The privy council reported to her Majesty 'as their opinion in reply to the two questions which have been referred to them by your Majesty, that the Liquor License act, 1883, and the act of 1884 amending the same, are not within the legislative authority of the parliament of Canada. The provisions relating to adulteration, if separated in their operation from the rest of the acts, would be within the authority of the parliament; but, as in their lordships' opinion they cannot be so separated, their lordships are not prepared to report to your Majesty that any part of these acts is within such authority.'^f Dominion liquor license case.

But a test case from Ontario, 'Huson v. the Corporation of the Township of South Norwich,' involving the question as to whether a province has the right, concurrently with the dominion, to legislate on prohibition of intoxicating liquors, is now before the Supreme Court.

In this case a by-law was passed in the township named under statutory provisions, prohibiting the retail sale of liquors. The High Court of Justice gave judgment in April 1891, quashing the by-law; but the Court of Appeal, on 10 May, 1892, reversed this judgment. The case was taken on appeal to the Supreme Court, where it has been argued, and now (June 1893) stands for judgment.

In 1874, and again in 1875, acts of the Nova Scotia legislature incorporating steamship companies were declared to be *ultra vires* by the dominion minister of justice, because they professed to allow the ships to run beyond the limits of provincial jurisdiction.^g But local governments have been declared by the Privy Council to be competent not only to authorise the construction of local works, but also to raise by local taxation a subsidy to promote the construction of works deemed to be of local advantage.^h

In December, 1877, the Superior Court of Quebec decided that the provincial legislature had not power to declare the salaries of employés of the dominion government to be liable to seizure; and Income tax.

^f According to the practice of the committee of the privy council, —under 3 & 4 Wm. IV. c. 41, sec. 4—an opinion, without reasons attached, is given by their lordships when deciding cases submitted for consideration, involving intricate questions of law, but not brought on appeal, accompanied with advice to

her Majesty as to allowance or disallowance.

^g Doutre, Const. of Canada, p. 234. See Nova Scotia Assem. Jls. 1883, App. No. 15.

^h Queen v. Dow, 1 Pugsley, p. 300; overruled on appeal, 6 L. R. P. C. p. 272.

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decisions.

that so much of the 5th section of the Provincial Act, 38 Vict. c. 12, as required a return to be made in regard to public officers, was not applicable to an officer appointed by the dominion government, although he resided in the city of Montreal in the capacity of collector of inland revenue for the federal government.¹

In March, 1878, the Ontario Court of Appeal, reversing a judgment of the Court of Queen's Bench, held that a provincial legislature is not competent, under the British North America Act, 1867, to impose a tax upon the official income of an officer of the dominion government, or to confer power to this effect upon a municipality; and that a section of an Ontario statute which authorised the levying of assessments on salaries of dominion officials was *ultra vires*.^j

To the same effect, in February 1881, the Supreme Court of New Brunswick decided that the income of a dominion customs' officer residing in St. John was not subject to taxation for municipal purposes.^k

Windsor
and Annapolis
Railway.

In March, 1878, the Supreme Court of Nova Scotia in equity gave judgment in a case respecting the Windsor and Annapolis Railway, that the claim of the dominion government that this road was 'public property of the dominion' gave the Parliament of Canada a right to legislate, but only so as 'to dispose of the interest it had in such property.' But as this railway was 'wholly within the province' it could only be dealt with generally by the local legislature.¹ This case was taken on appeal to the Supreme Court of Nova Scotia, which decided (in August 1878) that this being a local work the dominion statute, 1874, c. 16, was *ultra vires*.^m But on appeal to the Judicial Committee of the Privy Council upon the validity of certain legislative proceedings affecting this road, it was decided that the dominion statute was valid and within the competency of the Parliament of Canada, under the British North America act.ⁿ

In July, 1878, the Judicial Committee of the Privy Council—affirming judgments of the Quebec Court of Queen's Bench and Quebec Superior Court—decided that an Act of the Quebec legis-

¹ L. C. Jurist, v. 22, p. 268.

^j *Leprohon v. The City of Ottawa*, 40 U. C. Rep. p. 486. 2 Ont. App. Rep. p. 522. As to rule of public policy which forbids one legislature to tax the officials, &c., of another, see American cases cited in this case.

^k *Pugsley & Burbidge, N. B.*

Rep. v. 4, p. 487.

¹ *Russell & Chesley, Eq. Rep. p. 288.*

^m *Russell & Chesley, N. S. Rep. v. 3, p. 376.* See also Judge Ritchie's decision, March 1880, in *N. S. Equity Decisions, p. 383.*

ⁿ 7 L. R. App. Cas. 178.

lature imposing a stamp duty upon policies of assurance, and on receipts and renewals thereof, was in excess of the powers of provincial legislatures under the Imperial statute, it being virtually a stamp act, and not—as it purported to be—merely a license act. It did not impose a tax on taking out a license to follow the business of insurance—which would have been within the competency of a provincial legislature—but it imposed a tax on the taking out of a policy of assurance. A provincial legislature may impose ‘direct taxation within the province’ for revenue purposes. But a stamp duty is ‘indirect taxation,’ which can only be levied by authority of the dominion parliament. The act was accordingly declared to be *ultra vires* and void.^o

Constitutional decisions.

Assurance stamp duty.

In March, 1882, for similar reasons, the Quebec Act, 43-44 Vict. c. 9, imposing stamp duties upon law papers and proceedings, was declared to be illegal and *ultra vires* by the Quebec Superior Court at Montreal.^p The decision was reversed on appeal by the Court of Queen’s Bench, Chief Justice Dorion dissenting.^q But on appeal to the Supreme Court of Canada the decision of the Superior Court was confirmed,^r and subsequently sustained by the Privy Council.^s

In September, 1878, the Supreme Court of British Columbia decided that an Act passed by the provincial legislature in the preceding session, requiring every Chinese person over twelve years old to take out, under heavy penalties, a license every three months, for which ten dollars shall be paid in advance—in lieu of the customary taxation payable by the people for public purposes—was *ultra vires* and unconstitutional; not only as being at variance with the treaty obligations between Great Britain and China, under which Chinese immigrants into any part of the Queen’s dominions should be free from exceptional burdens and disabilities, but primarily because, under the British North America Act, it appertains to the dominion parliament, and not to the provincial legislatures, to pass laws affecting trade and commerce, the rights of aliens, and the obligation of treaties.^t

Chinese duty.

^o Att.-Gen. for Quebec v. The Queen Ins. Co. 3 L. R. App. p. 1090. In Regina v. The Justices of the Peace of King’s County, a section of a New Brunswick Act was declared to be void, as being beyond the powers of the local legislature. 2 Pugsley Rep. p. 535. For similar cases, see Regina v. Chandler, 1 Hannay, N. S. Rep. p. 548. *Ex parte* Marks, Unpubl. Rep. New

Brunswick, Hil. T. 1872. Regina v. Lawrence, 43 U. C. Q. B. 164.

^p Legal News, v. 5, p. 101.

^q *Ib.* p. 397. L. C. Jurist, v. 26, p. 331.

^r Reed v. Att.-Gen. 8 Sup. Ct. Rep. p. 408.

^s 10 L. R. App. p. 141.

^t Judgment of Mr. Justice Gray, as to the validity of the Chinese Tax Bill. (Printed by order of Go-

Constitutional
decisions.

By two judgments, delivered respectively in March and May, 1879, the Ontario Court of Appeals gave important decisions in the construction of sub-section two of the ninety-first section of the British North America Act, 1867, which assigns all matters affecting 'the regulation of trade and commerce' to the parliament of the dominion, and of sub-section eleven of the ninety-second section of the Act, whereby 'the incorporation of companies with provincial objects' is assigned exclusively to the legislatures of the provinces.

Insurance
cases.

The judgments above mentioned concerned, firstly, the Citizens' Insurance Company, which had been incorporated by an Act of the dominion parliament passed in 1876; secondly, the Western Assurance Company, which was incorporated by the parliament of Canada before confederation, whose charter was afterwards amended by the dominion parliament; thirdly, the Queen's Insurance Company, incorporated under the Imperial Joint Stock Companies' Act. Cases in relation to these companies had been adjudicated upon by the Court of Queen's Bench of Ontario, and were submitted afterwards to the consideration of the provincial court of appeals.

This court decided that, while 'the regulation of trade and commerce' in Canada was within the exclusive jurisdiction of the dominion parliament, and while that parliament was competent to incorporate companies to transact insurance business throughout the dominion, with liberty to enter into such contracts as should come within the designated purposes of the company, yet that it had no power to confer privileges to be exercised within any of the provinces except with their assent and recognition, and could not authorise a company created by dominion legislation to make contracts in particular provinces, except as the legislature of the province might ratify and approve. The Ontario Act, 39 Vict. c. 24, to secure uniform conditions in policies of fire insurance, was within the competence of the provincial legislature. For any provincial legislature was competent, in its discretion, to exclude a dominion or even an Imperial corporation from entering into contracts of insurance *within the limits of the province*, and might exact whatever security it should deem to be reasonable for the performance of its contracts.

Within their respective limits the court held that each legislature is supreme, and free from all control by the other.

And though, by a dominion statute, the general powers of a company previously incorporated are capable of being modified or

vernment; see Brit. Columbia Sess. opening B. C. Legislature, Jan. 29, Papers, 1879.) Brit. Col. Statutes, 1879. See further on this subject, 1878, c. 35. Governor's speech on *ante*, p. 194.

enlarged, such company is not, thereby, removed from the scope of provincial legislation prescribing conditions incidental to its contracting within the limits of the province.^u

Constitutional decisions.

Insurance cases.

In the interpretation of the words 'trade and commerce,' in section 91 of the B. N. A. Act, the judicial committee of the privy council, in rendering judgment in *Citizens' Insurance Company's Case*, construed that 'the words "regulation of trade and commerce," by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion. Their lordships abstain on the present occasion from any attempt to define the limits the authority of the dominion parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and, therefore, that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of section 92.'^x

In 1880 the Ontario Court of Queen's Bench gave judgment in a case of *concurrent legislation* by the federal parliament and the local legislature in reference to a line of railway situate within the province of Ontario. The question whether the Act of the dominion parliament was *intra vires* was incidentally considered by the judges, but the point being immaterial to the question at issue, it was not judicially determined.^y

Concurrent legislation.

In July, 1881, the Ontario Court of Appeal, in the case of the Grand Junction Railway from Peterborough to Toronto, decided that, notwithstanding previous legislation intended to give this road a dominion character, inasmuch as its amalgamation with the

^u 43 U. C. Q. B. Rep. p. 265. 4 Ont. App. Rep. pp. 96, 103, 281. Decisions confirmed on appeal to Supreme Court, Canada, v. 4, p. 215, by Privy Council, 7 L. R. App. p. 96; L. T. Rep. N. S. v. 45, p. 721. See *Devlin v. Queen's Insurance Co.* 46 U. C. Q. B. Rep. p. 611; see *Billington v. Prov. Ins. Co.* 24 Grant Ch. Rep. p. 299; 3 Can. Sup. Ct. Rep. p. 182; *Beard v. Steele*, 34 U. C. Q. B. Rep. p. 43; *Dear v.*

Western Ass. Co. 41 U. C. Q. B. p. 553. See cases in *Doutre*, Const. of Canada, p. 266.

^x *Citizens' Insurance Co.* 7 L. R. App. p. 113.

^y *Re Grand Junction Railway Co. et al.* U. C. Q. B. v. 45, p. 302. Nevertheless, upon appeal the court decided against the validity of the Dominion Act. See also *ante*, p. 556. Also *Booth v. McIntyre*, Ont. C. P. Rep. v. 31, p. 183.

Constitutional decisions.

Grand Trunk had not been effected, it was purely a local work, and not the proper subject for dominion legislation.²

Municipal powers.

On December 12, 1879, the Court of Queen's Bench of Ontario decided that under the Municipal Act city councils may pass by-laws to prevent the sale of certain articles in markets, public streets, and vacant lots adjacent thereto. This was held to be a matter of municipal government within the powers of local legislatures, and not an interference with dominion rights to 'regulate trade and commerce.'^a To the same effect the Superior Court at Montreal, in two judgments in 1876 and in 1879, affirmed the right of the provincial legislature to authorise cities to make by-laws imposing license taxes on the sale of meat, &c., elsewhere than in the public markets.^b

Taxes.

On May 31, 1879, in the case of *Ross v. Torrance*, Judge Johnson, sitting in the Superior Court, Montreal, decided that the power claimed by the city of Montreal to impose, by way of a penalty, 10 per cent. interest on overdue taxes, and which had been enforced under the authority of an Act of the Quebec legislature passed in 1878, was illegal, notwithstanding that such a power had been lawfully conferred by the provincial parliament of Canada prior to confederation.^c But this case has been overruled by a more recent decision of the Supreme Court of Canada in 1891, in *Lynch v. The Canada N.-W. Land Company*. By the Municipal Act of Manitoba provision is made whereby persons in the cities paying taxes before December 1, and in rural districts on the 31st of the same month, are allowed 10 per cent. discount; after those dates until March 1 the taxes are payable at par, and after March 31 a rate of 10 per cent. is levied on the original amount. It was held by this court, reversing the decision of the court below, 'that the 10 per cent. added on March 1 is only an additional rate or tax imposed as a penalty for nonpayment, which the local legislature, under its authority to legislate with respect to municipal institutions, had power to impose, and it was not "interest" within the meaning of section 91 of the British North America Act. *Ross v. Torrance* (2 Legal News, 186) overruled.'^d

Transfer of railway.

In February, 1880, the Judicial Committee of the Privy Council held (reversing the judgment of the Quebec Court of Queen's Bench) that the transference of a federal railway—the Quebec, Montreal, Ottawa, and Occidental railway—with its property, rights and powers, by deed confirmed by an Act of the Quebec legislature, to the Quebec Government, and through it to a new company subject to

² Ont. App. v. 6, p. 339.

^a 44 U. C. Q. B. Rep. p. 643.

^b L. C. Jurist, 24, pp. 259, 263.

^c 2 Legal News, p. 186.

^d 19 Sup. Ct. Rep. p. 204.

provincial control, was invalid, and that such a transaction required an Act of the dominion parliament to give it effect.^e

Constitutional
decisions.
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Fisheries
license.

In 1879, it was decided, by the Supreme Court of New Brunswick, that a license granted by the minister of marine and fisheries of the dominion of Canada—pursuant to the Canada statute (31 Vict. c. 60) for the regulation of the fisheries—authorising certain persons to fish in fresh-water rivers in New Brunswick, was illegal. The court were of opinion that, inasmuch as the several provincial legislatures, prior to confederation, whilst enacting necessary laws for the protection of fisheries, had always scrupulously abstained from any interference with the right of property of the riparian owners in the fish, it was therefore not competent for the dominion parliament, in legislating under the authority of the ninety-first section of the British North America Act, in regard to 'the sea-coast and inland fisheries,' in the dominion, to assume a greater power than the legislatures of the different provinces had been accustomed to exercise. The Canada Act (31 Vict. c. 60) could not be construed to authorise the grant of leases in fresh-water rivers where such rights did not already exist; and any lease granted by the dominion minister of marine and fisheries to fish in fresh-water rivers which are not the property of the dominion, or in which the soil is not in the dominion, is accordingly null and void. For the British North America Act is distributive merely in respect to powers of legislation exercisable by the dominion parliament and by the local legislatures respectively; and the dominion parliament may not entrench upon property and civil rights which are under the guardianship and subject to the power of the local legislatures, *except* to the extent that may be required to enable parliament 'to work out the legislation upon the particular subjects specially delegated to it.'^f

But, with regard to this exception, it is important to observe that by a decision of the Privy Council (in the case of *Cushing v.*

^e 42 L. T. N. S. p. 414; 5 L. R. App. p. 381. See Can. Act, 36 Vict. c. 82, under which this railway was first converted into a dominion work, and specially sections 5, 6, and 7, substituting dominion for provincial legislation for the direction and control of the road. In proof of legality of this proceeding see *Regina v. O'Rourke*, 1 Ont. Rep. p. 464.

^f *Steadman v. Robertson*, 2 Pugsley & Burbidge, p. 580. See also to same effect, *Robertson v.*

Steadman, 3 Pugsley, p. 621; *Phair v. Venning*, Can. L. T. v. 3, p. 317. This decision was substantially confirmed by a judgment in the Canadian Exchequer Court in Oct. 1880, in *Robertson v. The Queen*; the decision as given in the text was upheld, Can. Sup. Ct. Rep. v. 6, pp. 52-143. See a protest of the New Brunswick H. of Assem. against proposed dominion legislation on this subject at variance with these decisions, Assem. Jls. 1883, May 2.

Constitu-
tional
decisions.

Bank-
ruptcy
and in-
solvency.

Dupuy) it is declared to be a necessary implication that the Imperial statutes, in assigning to the dominion parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the provinces, so far as a general law relating to those subjects might affect them. Such legislation, upon any subject within the prescribed powers of the dominion parliament, would not infringe on the exclusive powers given to the provincial legislatures.^g On the other hand, upon the same principle, but in confirmation of the exercise of provincial powers, in a matter of civil rights, it was held by the Court of Queen's Bench in Montreal (confirming the judgment of the court below) that the Pharmacy Act of 1875 was not *ultra vires* of the local legislature, although it trenched incidentally on the subject of trade and commerce assigned to the dominion parliament.^h The impossibility of defining by a rule of general application what may be or may not be *intra vires* of the Parliament of Canada or of the local legislatures is well stated by Chief Justice Ritchie in the case of the Queen v. Robertson.ⁱ The learned Chief Justice, however, proceeds to point out the nearest approach to such a rule for reconciling apparently conflicting legislative powers under the British North America Act, which can be gathered from judicial interpretations. The Privy Council, in affirming the legality of the Canada Temperance Act of 1878, also enunciated a broad rule of interpretation on this subject.^j

Building
society.

On March 24, 1882, the Quebec Court of Queen's Bench, in the case of 'The Colonial Building and Investment Association,' incorporated by dominion statute 37 Vict. c. 103, reversed the decision of the Superior Court, which had dismissed the petition on the ground that the object of the Act was to create a building society for provincial purposes, which could not be effected without the aid of the provincial legislature and in contravention of the Building Acts of the province, and the company was therefore illegally formed and incorporated. In November, 1883, on appeal to the Privy Council, the judgment of this Court was reversed and that of the Superior Court affirmed, on the contention that though the Company had hitherto thought fit to confine its operations to one province, that fact could not affect its status or capacity as a

^g 5 L. R. App. 409. See *Beausoleil v. Frigon*, 1 Quebec Q. B. Rep. p. 70; also *Peek v. Shields*, 6 Ont. App. Rep. 639. See *ante*, pp. 299 and 545.

^h See *Bennett v. The Pharmaceutical Association of Quebec*, 4

Legal News, 125; also *Jones v. Canada Central Railway Co.* in relation to local legislation on property and civil rights, 46 U. C. Q. B. 250.

ⁱ 6 Can. Sup. Ct. Rep. p. 110.

^j 46 L. T. Rep. N. S. 889. See *Can. L. T. Sept. 1882*, pp. 424, 425.

corporation, as it had been incorporated with powers to carry on its business throughout the dominion, powers that could alone be conferred by the dominion parliament.^k

Constitutional decisions.

On January 23, 1885, on appeal from the Quebec Superior Court, nine cases were submitted to the Court of Queen's Bench, instituted by the Revenue Inspector of the district of Montreal, five of which were against banks, the others against insurance, manufacturing, railway, and navigation companies, to recover taxes imposed under an Act of the Quebec legislature, 45 Vict. c. 22, entitled 'An Act to impose certain direct taxes on certain commercial corporations.' Six of the above companies were incorporated by the dominion parliament, or prior to the passing of the British North America Act, one incorporated in England and two in the United States. In the court below the actions in the five bank cases were dismissed by Mr. Justice Rainville, on the contention that the tax imposed under the Act was not a direct tax, and therefore beyond the power of the provincial legislature to levy; while the four other cases were maintained by Mr. Justice Jetté and Mr. Justice Mathieu on an opposite conclusion, that the tax was a direct tax within the meaning of section 92, § 2, of the British North America Act. The Court of Queen's Bench confirmed the decision of the four appeals, and reversed Mr. Justice Rainville's judgment in the five bank appeals.¹ On appeal to the Privy Council in June, 1887, the judgment of the Queen's Bench was sustained, and their lordships held the Act of the provincial legislature in question to be *intra vires*, and that the tax on banks doing business in the province is a direct tax within sub-section 2 of section 92 of the British North America Act, the meaning of which is not restricted in this respect by either sub-section 2, 3, or 15 of section 91; the same equally applying to insurance companies.^m

Taxation of banks and insurance.

Similar cases, wherein the validity of Acts passed by provincial legislatures has been pronounced upon by Canadian courts of law, have already been reviewed in other parts of this volume, and need not, therefore, be specially cited in this section. It will be sufficient to refer to the case of the School Acts passed by the New Brunswick legislature;ⁿ to the Ontario and Quebec statutes for the union of Presbyterian churches;^o to the Goodhue Estate Act, also passed by the legislature of Ontario;^p and to the Ontario Executive Power Case.^q

Special cases reviewed elsewhere.

^k Att.-Gen. v. Colonial Building and Investment Society, 9 L. R. App. p. 165.

L. R. App. p. 575.

ⁿ See *ante*, p. 458.

^o *Ib.* p. 481.

^p *Ib.* p. 526.

^q *Ib.* p. 367.

¹ 1 Q. B. Montreal, L. R. p. 199.

^m Bank of Toronto v. Lambe, 12

Dominion
and pro-
vincial
taxation.

A comparison of the sections of the British North America Act, 1867, in relation to the powers of taxation conferred upon the dominion parliament and upon the provincial legislatures respectively—together with the decisions of the Judicial Committee of the Privy Council thereon—leads to the conclusion that, notwithstanding the apparent contradiction between sub-section 3 of section 91 and sub-sections 2 and 9 of section 92, and notwithstanding the proviso at the end of section 91, the dominion parliament is empowered to raise revenue by any mode of taxation, whether direct or indirect, provided that such revenue is intended to be applied solely for dominion purposes; while, on the other hand, the provincial legislatures are only competent to impose direct taxation within their jurisdiction for provincial purposes, and to authorise the issue of licenses for the carrying on of any particular business or trade within the province, ‘in order to the raising of a revenue for provincial, local, or municipal purposes.’ They may also annex conditions to the exercise of any business or trade within the province.^r On this principle it was contended that the tax on commercial corporations imposed by the Quebec Statute, 45 Vict. c. 22, was a ‘direct tax’ within the competency of the provincial legislature; and that the corporations affected thereby, whether they derived their existence and powers from an Imperial, a dominion, a foreign, or a provincial source, were equally liable to taxation upon all their business transactions within the province. But this position was impugned by the decision in *Lambe v. The Ontario Bank*, hereinafter cited. The only limitations upon this principle, as yet ascertained by judicial authority, are the following:

Angers v. The Queen Insurance Co. 7 L. R. App. Cas. p. 1090; *Dow v. Black*, 6 L. R. P. C. p. 272; *Parsons v. The Insurance Co.* 7 L. R. App. p. 96.

1. That while a provincial legislature is competent to impose a direct tax or to require a license to be taken out for the carrying on of a retail trade, it would be an infringement of the powers conferred upon the dominion parliament 'for the regulation of trade and commerce' for a provincial legislature to require a license in the case of a *wholesale* business.^s

Dominion
and pro-
vincial
taxation.

2. Agreeably to decisions by several provincial courts, by the dominion Supreme Court, and by the Judicial Committee of the Privy Council, a local legislature may not pass a law to prohibit, either directly or indirectly, the manufacture or sale of spirituous liquors, for this would be an infringement of the supreme powers for the regulation of trade. It has been asserted that 'the only provincial prohibitory Liquor Law now in force is a clause in the Nova Scotia license, under which the municipal council can refuse to grant any licenses, a power which has been extensively used.'^t

To revert to provincial powers of taxation. By a judgment of the Superior Court of Montreal in May 1883, in *Lambe v. The Ontario Bank*, it was decided that the tax imposed on banks by the Quebec Act, 45 Vict. c. 22, is an indirect tax. Being on the franchise, and affecting a dominion corporation of which the shares are only in part owned by residents in Quebec, it is not 'taxation within the province.' And it interferes with exclusive federal powers regarding 'Banks and Banking.'^u

For the distinction between a license to carry on a particular trade, which may be authorised by a provincial legislature, and a tax or stamp duty on business done—which is *ultra vires* of such legislatures—see *ante*, p. 557, and see Report of Inspector Hunter on Insurance in Ontario in 1882.^v To a similar effect, it

^s See cases cited *ante*, p. 548.

^t Com. Pap. 1883, v. 45, p. 557.

^u Legal News, v. 6, p. 158.

^v Ontario Sess. Pap. 1882, No. 21.

Dominion
and pro-
vincial
powers.

was held by C. J. Spragge that sub-section 9 of section 92 of British North America Act is cumulative to sub-section 8; they both authorise provincial legislation in relation to licenses for the purpose of raising a revenue and for the regulation of matters of police.^w

The power of the dominion parliament to pass a general law of nuisance, as incident to its right to legislate as to public wrongs, or to pass a general prohibitory liquor law, as incident to a similar right, is not incompatible with a right in the provincial legislatures to authorise a municipal corporation to pass a by-law against nuisances hurtful to public health, or to pass by-laws to restrain or diminish intemperance, as incidental to municipal institutions.^x

But it has since been decided, by the highest judicial tribunal, that while it is competent, by local authority, to make reasonable police regulations to restrain intemperance, for the preservation of good order in particular municipalities, yet that it appertains to the parliament of the dominion alone, under the power given to it to regulate trade and commerce, to prohibit the traffic in intoxicating liquors in the dominion or in any part thereof.^y

Thrasher
case.

In 1881 a curious case arose in British Columbia, touching the authority and jurisdiction of the local legislature over provincial courts. In a case submitted to the Supreme Court of the province, commonly called the *Thrasher Case*, the judges unanimously declared that 'the Supreme Court is not a provincial court within the meaning of the 14th sub-section of section 92 of the British North America Act; that the local legislature has no control over its procedure,' and 'cannot itself make rules to govern the procedure of the court, or delegate the power to the Lieutenant-Governor in Council to do so. . . . That in these respects three provincial Acts enumerated are *ultra vires*.' This judgment was rendered on

^w Reg. v. Hodge, Ont. App. Rep. Montreal, 6 Leg. News, p. 210.
v. 7, p. 246.

^y Griffith v. Rioux, Leg. News,
v. 6, p. 211.
^x Sulte and the City of Three Rivers; Pillow and the City of

February 10, 1882.^z Its contention at once raised an issue between the court and the local legislature that required to be determined by the highest judicial authority.^a

Dominion
and provincial
powers.

Meanwhile, the legislature resented this denial of its competency to pass the Acts in question, and proceeded to give effect to its convictions by another enactment, establishing and constituting a new court, to be called the 'Provincial Superior Court of Queen's Bench,' which should have jurisdiction and powers identical with those of the existing 'Supreme Court.' As soon as the Governor-General shall have appointed a chief justice of British Columbia, and four puisne judges, this Act would come into force. Then the present officers of the Supreme Court would be transferred to the new court, and proceedings pending in the former carried on to completion in the latter. On and after December 1, 1882, all provincial grants for the administration of justice within the province 'shall be expended solely towards the maintenance of courts constituted by this Act.'^b

Thrasher
case.

In June, 1883, the Supreme Court of the dominion, in reply to queries submitted to their hearing and consideration by the Governor-General in Council, declared their opinion that the Supreme Court of British Columbia was a provincial Court within the meaning of sub-section 14 of section 92 of the British North America Act: that the legislature of the province had exclusive authority over procedure in civil matters in said court, and could make rules to govern the same, and delegate such power to the Lieutenant-Governor in Council. Furthermore, the court were of opinion that the particular local Acts above referred to, so far as they relate to procedure in the Supreme Court of British Columbia, were within the legislative authority of the local legislature; and that the Judicial District Act, 1879, was equally valid, and applied to judges appointed before that Act came into force.^c

^z British Col. Sess. Pap. 1882, p. 358. The Thrasher Case printed in Victoria, B. C. 1882.

^a In answer to similar objections urged by the judges against the British Columbia Act of 1879, c. 12, the dominion minister of justice had sustained the validity of the statute (Can. Sess. Pap. 1882, No. 141, p. 204). In England the Rules of Court are made by a committee of judges and must be laid before Parliament. They are liable to be annulled on an Address to Her

Majesty from either House. Wilson's Prac. Judicature, ed. 1888, p. 79.

^b British Columbia Stat. 1882, c. 3. For articles on this controversy, see Can. L. J. for April to July, and Can. L. T. July and Dec. 1882.

^c This is in accordance with the factum in the Thrasher Case, which was prepared on behalf of the province and submitted to the dominion Supreme Court. Sess. Pap. B. C. 1883, p. 403.

Dominion
and pro-
vincial
powers.

Ontario
judicature
acts.

In May, 1883, the British Columbia legislature repealed the Provincial Superior Court Act, 1882.^d

By the Ontario Judicature Act, 44 Vict. c. 5, the existing superior courts in the province are united and consolidated into one High Court of Justice for Ontario. But the courts formerly in operation are not abolished by such new constitution; they are expressly declared to be continued under the new appellation of the High Court.^e Moreover, by the eighty-seventh section of the Judicature Act aforesaid, it is provided that 'matters connected with dominion controverted elections' shall not be affected by this Act; in other words, that the jurisdiction of the several superior courts in Ontario, of which the High Court of Justice is composed, shall continue to be exercised as formerly in respect to dominion controverted elections. This principle, after some conflicting decisions, has been finally established by the courts.^f

Judiciary.

By the British North America Act, section 96, the Governor-General appoints—and by section 100 the Parliament of Canada fixes and provides the salary of—all judges in the provinces of the superior, district, and county courts (except Probate Court judges in Nova Scotia and New Brunswick, who are appointed by provincial authority). But as, by sub-section 14 of section 92, the provincial legislatures make laws for the administration of justice in the province, including the constitution, &c., of provincial courts, it has been decided that they may appoint judges to existing provincial courts not included in the above enumeration, as, for example, judges to division courts. It has been usual to empower the county court judges to preside at division courts. But as the provincial legislature gives them a statutory commission to hold such courts, they should be equally competent to appoint others to do the work.^g The dominion government, however, have objected to the exercise of such powers by the provincial legislatures, so far, at least, as they claim to extend the jurisdiction of division courts, the judges of which are conceded to be of provincial appointment, or to encroach upon the powers specially assigned to the dominion parliament.^h

Furthermore, the dominion government objected in 1883 to the

^d B. C. Statutes, 46 Vict. c. 7; and see B. C. Assy. Jls. 1883, p. 10.

^e Ont. C. P. Rep. v. 32, p. 398.

^f *In re North York, West Huron and Russell Election Cases*. Judge Cameron's decisions, Sept. and Oct. 1882, 32 C. P. Rep. p. 458; 1 Ont. Rep. p. 433-442; and see Mitchell

v. Cameron, Can. L. T. v. 3, p. 446; Can. Sup. Ct. Rep. v. 8, p. 126.

^g See *Regina v. Bennett*, Ont. Rep. v. 1, p. 459; *Wilson v. McGuire*, *ib.* v. 2, p. 118.

^h See Can. Sess. Pap. 1882, No. 141, pp. 17, 28, 41, 193, 198, 207.

appointment by the Lieutenant-Governor, under a provincial Act, of Gold Commissioners, either for the whole province or for any district therein, who shall preside over a court or courts to be established in mining districts. 'The appointment of a judge performing high judicial functions, whose appointment, under the British North America Act, 1867, should be made by the Governor-General in Council, is in effect to be made by the Lieutenant-Governor.' 'Legislation thus offending against the constitutional principles' laid down by the Imperial statute aforesaid 'should not be allowed to go into operation.' Accordingly, this Act was disallowed.¹

Dominion
and provincial
powers.
—
Judiciary.

In the Session of 1888 the Quebec Government passed an Act called the District Magistrates Act. It provided for the abolition of the Circuit Court at Montreal—presided over by judges of the Superior Court, who are appointed by the dominion government—and created in lieu thereof a new court, to be known as the 'District Magistrates' Court.' By the Act in question, the Lieutenant-Governor was empowered to appoint to this court two justices, at a salary of \$3,000 each, to be paid out of the Consolidated Revenue Fund of the province, who were to be styled district magistrates, and were to be irremovable 'except on the joint address of the Legislative Council and Assembly.' All the powers and jurisdiction hitherto exercised by the Superior Court judges, in their capacity as judges of the Circuit Court, being vested in these magistrates, made them virtually judges, as the words "Judge of the Superior Court," "judge," or "judges," whenever referring to their powers and duties respecting matters connected with the Circuit Court sitting in that district should mean the district magistrates of Montreal.'²

This Act was disallowed, as by section 96 of the British North America Act it is provided that judges of the superior and district courts in each province are appointed by the Governor-General; by section 99, that they are only removable by the Governor-General on address of the Senate and House of Commons; and by section 100, that their salaries are fixed and provided by the Parliament of Canada.

The powers, therefore, that the District Magistrates Act sought to confer upon the Lieutenant-Governor in Council were in excess of the powers conferred on the provincial legislature by the British North America Act, and were an invasion of the rights of the dominion parliament.

To meet the necessities of the case, the Quebec legislature, acting

¹ Br. Col. Sess. Pap. 1883, p. 491. tice on disallowance of the Act, Can.

² Report of the minister of jus- Sess. Pap. 1889, 47c.

Dominion
and pro-
vincial
powers.

Judiciary.

within its rights, in the following session introduced an amendment to the law, creating a Magistrates' Court for the district of Montreal.^k

The dominion government likewise object to any increase to the salaries or emoluments of the judges of the superior or of the county courts being made by the provincial legislatures, and the Imperial law officers of the Crown have declared any such legislation to be *ultra vires*.^l

In September, 1883, it was held by the Chancery Division of the High Court of Justice for Ontario, that the dominion Act, 31 Vict. c. 76, for taking evidence in Canada in relation to civil matters pending before courts of law elsewhere (and which was made applicable to criminal matters by Canada Act of 1883, c. 35) is not *ultra vires*, and does not trench upon the exclusive jurisdiction vested in the provincial government in the administration of justice under the British North America Act, section 92, sub-section 14, inasmuch as evidence so taken is of *extra* provincial pertinence, and is not a matter relating to civil rights in the province.^m

When
federal
powers
may not
be dele-
gated.

In any case where, in the distribution of powers by the British North America Act, certain matters are assigned to the legislative authority of the dominion parliament, it is not competent for that body to delegate its functions to the local legislature, so as by an absolute grant of discretionary power to enable the local authority to deal with the matter itself. It is otherwise, however, if the dominion parliament merely accepts and ratifies arrangements made or to be made in accordance with its own legislation on the subject. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a provincial legislature, they may be well exercised either absolutely or conditionally. Legislation on the use of particular powers, or on the exercise of a limited discretion, entrusted by the legislature to persons in whom it places confidence, is no uncommon thing, and in many circumstances it may be highly convenient.ⁿ

^k Quebec Stat. 1889, c. 30.

^l P. E. Island Assem. Jour. 1880, App. A.

^m Wetherell v. Jones, Can. Law

J. v. 19, p. 315.

ⁿ C. J. Wilson in Regina v. O'Rourke, Ont. C. P. Rep. v. 32, p. 401; C. J. Hagarty, Ont. Rep. v. 1,

The right of a provincial legislature, in a particular matter, to delegate its own authority to a subordinate body has been admitted, but not without dispute. However, this does not involve a further power in the body so entrusted with delegated functions itself to depute others to fulfil such functions.^o

Dominion and provincial powers.

In 1884 a controversy arose between the dominion and British Columbia governments in regard to the rights in the gold found in the forty-mile belt of land granted by British Columbia to the dominion for the purpose of assisting in the construction of the Canadian Pacific Railway. A test case as to whether the precious metal lying within the forty-mile belt was vested in the Crown as represented by the dominion, or in the Crown, as represented by the provincial government, was submitted in 1886 to the Exchequer Court. This court, by consent and without argument, gave judgment in favour of the dominion government.^p On appeal to the Supreme Court this decision was affirmed, on the contention that the land in question was not given by grant or conveyance, but by statutory transfer to the dominion from the province of British Columbia, and that the expression 'public lands' in the eleventh of the articles of union of British Columbia with Canada was sufficient to pass the interest in question. Also relying on the following minute of February 10, 1883, as showing how the transaction was understood by the provincial government at the time: 'That it be one of the conditions that the dominion government, in dealing with lands in the province, shall establish a land system equally as liberal, both to mining and agricultural industries, as that in force in this province at the present time, and that no delay shall take place in throwing open the land for settlement.'^q On appeal to the Privy Council in November, 1888, the judgment of the Supreme Court was reversed, on the ground that the title to public lands of British Columbia is vested in the Crown, but that the right to administer and dispose of these lands, together with all royal and territorial revenues, had been transferred to the province before the union. That it was not the intention that the lands in question should be taken out of the province, and the dominion government become a freeholder within the province. The interest of the dominion ceased in these lands,

Rights in precious metals.

p. 475; *The Queen v. Burah*, L. R. 3 App. Cas. p. 889; *Russell v. The Queen*, *ib.* 7 App. Cas. p. 835.

^o See Can. L. J. v. 18, p. 431;

per contra, see Can. L. T. v. 2, p. 575, v. 3, p. 279.

^p 1 Ex. Rep. Can. p. 343.

^q 14 Sup. Ct. Rep. Can. p. 345.

Rights in
precious
metals.

and they would revert to the same position they were in before their conveyance, so soon as the dominion government had recouped the cost of construction of the railway by selling the land to the settlers, when they could no longer be public lands. That according to the law of England precious metals are not incidents to the land unless severed from the title of the Crown and vested in a subject. That the land system referred to in the minute of February 10, 1883, was governed by special statute, which included baser metals, but not precious.^r

St. Catha-
rine's
Milling
and Lum-
bering Co.

On June 10, 1885, an action in the Ontario Court of Chancery was brought to restrain the St. Catharine's Milling and Lumbering Company, incorporated under dominion statute, from cutting timber in the province of Ontario on land that had been a tract of Indian territory until released and surrendered to the dominion government by treaty on October 3, 1873. By an article of this treaty the Indians retained certain rights in hunting and fishing in the surrendered territory, excepting on lands that might be required for settlement, mining and lumbering. The company contended that it had obtained, by payment for license to the dominion government, permission to enter upon and cut timber on this land; that the timber and lands were not the property of the province of Ontario, but of the Crown as represented by the dominion, which had acquired the Indian title to the land in consideration of a large expenditure of money for the benefit of the Indian tribes. The court ruled against the company in favour of the province, and held that the Indian title to the lands was extinguished by the Dominion Treaty of 1873, and enured to the province as constitutional proprietor by title, and that the dominion had not the power to hold or transfer the title so as to oust the vested rights of the province as part of the public domain of Ontario, and that the dominion government had jurisdiction only over lands *reserved* for Indians.^s On appeal to the Supreme Court this decision was affirmed.^t The case was carried to the Privy Council, on the condition that the dominion government should be at liberty to intervene in the appeal. Their lordships, in July, 1888, affirmed the decision of the Canadian courts, and contended that by section 109 of the British North America Act each province receives, subject to the administration and control of its own legislature, the entire beneficial interests of the Crown in all lands within its boundaries, which at the time of union were vested in the Crown, that the Crown has all along a present proprietary estate in the land, upon which the Indian title was merely a burden,

^r Att.-Gen. B. C. v. Att.-Gen.
Canada, 14 L. R. App. p. 295.

^s 10 Ont. Rep. p. 196.

^t 13 Can. Sup. Ct. Rep. p. 577.

that the Indian treaty of 1873, surrendering the lands, left the 'Indians no right whatever to the timber growing upon the lands which they gave up, which is now fully vested in the Crown, all revenues derivable from the sale of such portions of it as are situated within the boundaries of Ontario being the property of that province.'^u

The Maritime Bank of New Brunswick, incorporated under dominion charter, became insolvent and stopped payment on March 7, 1887, when proceedings were taken to close its affairs under 'The Winding-up act.' At the time of its failure the provincial government had to its credit in the bank a sum of \$35,000, deposited in the name of the receiver-general of the province, being public moneys; likewise the dominion government had a larger sum deposited to its credit in the name of the receiver-general of Canada.

Liquidators
Maritime Bank
v. Receiver-
General
New
Brunswick.

Section seventy-nine of the Bank act declares that 'the payment of the notes issued by the bank and intended for circulation, then outstanding, shall be the first charge upon the assets of the bank in case of its insolvency.'

Upon liquidation of the bank the provincial government contended that the Crown in this case was represented, not by the governor-general, but by the lieutenant-governor, and accordingly claimed a priority of payment over all other creditors.

The Supreme Court of New Brunswick decided in favour of the province,^v and on appeal to the Supreme Court of Canada the judgment was confirmed.^w The committee of the privy council pronounced the decisions of both courts below to be sound. Lord Watson, who delivered the judgment, said :

'It is clear that the provincial legislature of New Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the government of Canada, and its status is in no way analogous to that of a municipal institution, which is an authority constituted for purposes of local administration. It possesses powers, not of administration merely, but of legislation, in the strictest sense of that word; and, within the limits assigned by section ninety-two of the act of 1867, these powers are exclusive and supreme. It would require very express language, such as is not to be found in

Powers of
provincial
legisla-
tures.

^u St. Catharine's Milling and Lumber Co. v. The Queen, 14 L. R. App. p. 60.

^v 27 N. B. Rep. p. 379. The case first came before the court as

to whether the Crown had priority of payment over other creditors, and was settled in favour of the Crown, *ib.* p. 357.

^w 17 Can. Sup. Ct. Rep. p. 657.

the act of 1867, to warrant the inference that the Imperial legislature meant to vest in the provinces of Canada the right of exercising supreme legislative powers in which the British sovereign was to have no share.

The
Crown re-
presented
in the
lieut.-
governor.

'In asking their lordships to draw that inference from the terms of the statute the appellants mainly, if not wholly, relied upon the fact that, whereas the governor-general of Canada is directly appointed by the Queen, the lieutenant-governor of a province is appointed, not by her Majesty, but by the governor-general, who has also the power of dismissal. If the act had not committed to the governor-general the power of appointing and removing lieutenant-governors, there would have been no room for the argument, which, if pushed to its logical conclusion, would prove that the governor-general, and not the Queen, whose viceroy he is, became the sovereign authority of the province whenever the act of 1867 came into operation. But the argument ignores the fact that, by section fifty-eight, the appointment of a provincial governor is made by the "governor-general in council by instrument under the great seal of Canada," or, in other words, by the executive government of the dominion, which is, by section nine, expressly declared "to continue and be vested in the Queen." There is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body who have no powers and no functions except as representatives of the Crown. The act of the governor-general and his council in making the appointment is, within the meaning of the statute, the act of the Crown, and a lieutenant-governor, when appointed, is as much the representative of her Majesty for all purposes of provincial government as the governor-general himself is for all purposes of dominion government.'^x

Judicial
interpre-
tation of
confede-
ration
statute.

The foregoing decisions are of inestimable value in the construction of the written constitution conferred upon Canada by the British North America Act. They lift out of the narrow groove of a mere technical interpretation principles of legislation concerning which Canadian statesmen, whether federal or provincial, need to be accurately informed, and should be agreed upon. They secure to the dominion parliament the exclusive control and determination of all questions

^x Liquidators of the Maritime N. Brunswick, App. C. 1892, pp. Bank of Canada v. Receiver-Gen. of 437-444.

of general import and significance; while they uphold the provincial governments in their statutory right to frame whatsoever laws may be necessary to develop their internal resources, and to strengthen and improve their local and municipal institutions. For vigilance, and the exercise of judicial impartiality by legal tribunals, is equally indispensable to prevent encroachment by the dominion parliament upon local rights—which have been assigned by imperial authority to the guardianship and control of the provincial legislatures—and to prevent invasion by local legislatures of the powers which appertain to the supreme jurisdiction of the dominion parliament.

Judicial interpretation of the B.N.A. act.

The appropriate limits of dominion and of provincial jurisdiction, thus ascertained and confirmed by judicial authority, coincide with the opinions expressed by leading statesmen in the Imperial Parliament as to the powers intended to be granted to the federal and local governments established in Canada by the British North America Act^y—powers that were broadly defined and apportioned in that statute, but not so explicitly as to dispense with the need for judicial interpretation, which is the surest and safest method of deciding all constitutional controversies.

^y See Hans. D. v. 185, pp. 566, 1178.

CHAPTER XVI.

DOMINION CONTROL OVER THE CANADIAN PROVINCES IN
MATTERS OF ADMINISTRATION.

Provinces
in the do-
minion of
Canada.

THE local governments which form part of the dominion of Canada, under the authority of the British North America act of 1867, are as follows: The provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, which were included in the original act of confederation, in 1867; the province of Manitoba, which entered the union in 1870; the province of British Columbia, which entered in 1871; the province of Prince Edward Island, which entered in 1873; and the North-west Territories, which have been governed, since 1888, by a governor and legislative assembly; prior to that date the governor was assisted by a nominated council.

Of these provinces five have but one chamber in their respective legislatures, viz., Ontario, New Brunswick, Manitoba, British Columbia, and the North-west Territories; while Quebec, Nova Scotia and Prince Edward Island still retain two; though the last-named province, in 1892, passed an act to abolish the upper chamber, which was reserved by the lieutenant-governor for the assent of the governor-general, and will doubtless be an accomplished fact shortly.^a Manitoba and New Brunswick formerly had upper houses, but they were abolished, the former in 1876 and the latter in 1891.

^a The present government of Nova Scotia (1893) has announced as its policy the abolition of the Upper Chamber, and appointees to vacancies in the Legislative Council are pledged to such a measure.

By the one hundred and forty-sixth section of the act of 1867—as explained by the British North America act, 1871, to remove doubts in respect to the government of the territories, and the alteration of boundaries of existing provinces—authority was given to the Queen in council to admit into the union any of the provinces or territories in British North America (including Newfoundland) which were not originally comprised therein, on addresses from the houses of parliament of Canada, embodying the terms and conditions of union agreed upon with the local authorities concerned. Moreover, upon a joint address of the senate and commons of Canada, dated May 3, 1878, representing the desirability of annexing to the dominion all British territories and possessions in North America and the islands adjacent thereto (save only Newfoundland and its dependencies) which were not already included in the dominion, the Queen in council, on July 31, 1880, was pleased to accede to this address, and to assign to the dominion parliament the authority of legislating for the future welfare and control of these territories.^b Newfoundland still remains outside of the union, and is the only colonial government in North America that has not expressed a desire to participate in the benefits of the same.

Provision
for new
terri-
tories.

And here it should be stated, that in giving effect, by the British North America act of 1867, to the desire of the several provinces to be federally united, by Imperial legislation, parliament was careful to preserve the substance of the constitutions previously conferred upon the respective provinces, and to make no change therein, excepting such as was absolutely necessary to consolidate the whole into a federal government, with subordinate local governments, forming one dominion.

^b Imp. Order in Council in Can. Dom. Gazette, Oct. 9, 1880.

Continu-
ance of
provincial
rights
after the
union.

By the one hundred and twenty-ninth section of the statute aforesaid, except as otherwise provided by this act, all laws in force in Canada, Nova Scotia, or New Brunswick at the union, and all courts of civil and criminal jurisdiction, and all legal commissions, powers, and authorities, and all officers, judicial, administrative, and ministerial, existing therein at the union, shall continue, in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the union had not been made; subject nevertheless (except as regards Imperial enactments) to be repealed or altered by the parliament of Canada, or by the legislature of the particular province, according to the authority of the parliament or of the legislature under this act. The effect of this clause—in connection with clauses one hundred and thirty and one hundred and thirty-five—is to secure the unbroken continuity, jurisdiction and operation in their appropriate sphere of action, of all laws, courts of justice, legal, executive, or ministerial authority, heretofore existing in any part of the new dominion—so far as the same had not been altered by the British North America act.^c

Moreover, a further advantage accrues from this section. It distinctly transmits to the provincial governments and legislatures exclusive jurisdiction over all matters of a local character which had previously been subject to legislation by the parliament of United Canada; save only when by the express terms of the British North America act such matters have been assigned to the control of the dominion parliament.^d

Accordingly, the value of this provision, in main-

^c Doutre, Const. of Canada, p. 362, citing cases in regard to the constitution and continuance of Canadian Courts. See also the Imperial act 28 & 29 Vic. c. 63, sec. 5.

^d See judgment in appeal of the Court of Q. B. Montreal, in 1881, in the municipality of Cleveland, &c. (Toll bridge), L. C. Jurist. v. 26, p. 1. See also Can. L. T. v. 2, p. 523.

taining unimpaired the framework of local institutions for the welfare and good government of Canada cannot be over-estimated. As we proceed to consider the functions appertaining to the Crown in the Canadian provinces, this will be increasingly apparent.

Provincial
executive
authority.

Inasmuch as the several local governments now, or hereafter to be included in the dominion of Canada, are, by the provisions of the British North America act of 1867, subordinated to the authority of the Queen, as exercised by the governor-general of Canada, and are thereby exempted from the direct control and oversight of the Imperial government, it is necessary to inquire what provision has been made for the exercise of executive authority in these provinces.

By the fifty-eighth and sixty-seventh sections of the Imperial act aforesaid, the governor-general is empowered—by and with the advice of the dominion privy council, and under the great seal of Canada—to appoint a lieutenant-governor in and over each of the provinces; and also an administrator, who shall execute the office and functions of the lieutenant-governor during the absence, illness, or other inability of that personage.

Control
of the
governor-
general

The commissions under which the lieutenant-governors of provinces in Canada exercise the functions of their office ‘authorise and empower and require and command’ them ‘to do and execute all things that shall belong’ to the command and trust confided to them, by virtue of their commission and of the provisions of the British North America act, 1867, in accordance with which they have been appointed. And likewise ‘according to such instructions as are herewith given to you, or which may from time to time be given to you,’ ‘under the sign-manual of our governor-general,’ ‘or by order of our privy council of Canada.’^e

over lieu-
tenant-
governors
of the
provinces.

^e See a form of the commission in Can. Sen. Jour. 1878, p. 175.

Provincial
executive
authority.

But, in point of fact, it would seem that though the commission of a lieutenant-governor expressly refers to instructions accompanying it, yet no instructions of either an affirmative or a negative kind have been sent with the commissions, or afterwards, at least as regards the older provinces of the dominion.^f

On the appointment, however, of the Hon. A. G. Archibald, in July 1870, as lieutenant-governor of the province of Manitoba, under the provisions of a dominion act for the establishment of a government therein, preliminary instructions for his guidance in office were approved by the governor-general in council on August 2 following, and directed to be forwarded to Mr. Archibald by the under-secretary of state for the provinces.

Office
of lieuten-
ant-
governor.

These instructions direct that the lieutenant-governor shall 'be guided by the constitutional principles and precedents which obtain in the older provinces.' They enjoin upon him the duty of forming a responsible executive council, in reference to which he is commanded to give his advisers 'the full exercise of the powers which in the older provinces have been wisely claimed and freely exercised;' 'but,' it is added, 'you will be expected to maintain a position of dignified impartiality, and to guard with independence the general interests of the dominion, and the just authority of the Crown.'^g

At that time, the lieutenant-governor of Manitoba was by another commission appointed lieutenant-governor of the North-west Territories, and he received from the department of the dominion secretary of state special instructions for his guidance in the government

^f Attorney - General Mowat's Memo. of Dec. 16, 1873, in Ontario Sess. Pap. 1874, No. 19. See *ante*, p. 519, for instructions to lieut.-

governors on disallowance of Provincial Bills.

^g Can. Sess. Pap. 1871, No. 20.

of those territories. These instructions principally related to dealings with the Indian tribes, and to opening up the country for settlement.^h

Provincial
executive
authority.

The lieutenant-governor of every province in the dominion holds office 'during the pleasure of the governor-general.' The office is usually held for a period of five years only, although the incumbent thereof (as in the case of Mr. Archibald) may be re-appointed for one or more additional terms. But it is expressly provided by the British North America act that no lieutenant-governor of a Canadian province 'shall be removable within five years from his appointment except for cause assigned, which shall be communicated to him in writing, within one month after the order for his removal is made; which cause shall also be communicated by message, within a week thereafter, to both houses of the dominion parliament.'ⁱ

It has been authoritatively stated of these officers that, 'however important locally their functions may be, [they] are a part of the colonial administrative staff, and are more immediately responsible to the governor-general in council. They do not hold commissions from the Crown, and neither in power or privilege resemble those governors, or even lieutenant-governors, of colonies, to whom, after special consideration of their personal fitness, the Queen, under the great

Limited
powers
of lieutenant-
governors.

^h Can. Sess. Pap. 1871, No. 20. In Oct. 1876, a separate lieutenant-governor was appointed for the North-west Territories, and at the same time, a separate government was formed under the name of the district of Keewatin, with the lieutenant-governor of Manitoba as lieutenant-governor *ex officio*. Dominion Ann. Reg. for 1879, p. 107.

ⁱ British North America act, 1867, secs. 58-67. The provision in the fifty-ninth clause was introduced 'to prevent the possibility of its be-

ing supposed that lieutenant-governors, under the new *régime*, were of necessity to be in sympathy with the dominion ministry of the day, and to be removable with every change of party.' And also 'to operate as a check upon the capricious and arbitrary exercise of the power of dismissal, by compelling the ministry to submit the reasons for the exercise of the royal pleasure to parliament.' Sir J. A. Macdonald's Memorandum in Com. Pap. 1878-79, v. 51, p. 152.

Provincial
executive
authority.

seal and her own hand and signet, delegates portions of her prerogatives, and issues her own instructions.' ^k

Compli-
ments
to lieut.-
governors.

On the other hand, by the official regulations of the Canadian militia, guards of honour are directed to be furnished, and salutes fired, at the opening and close of the dominion parliament, and likewise of the provincial legislatures, by the governor-general or the lieutenant-governors of provinces, respectively (Regul. 1887, Nos. 298, 299), and H.R.H. the Commander-in-Chief (by letter from the adjutant-general to the under secretary of state for the colonies, dated October 9, 1872), has directed 'that the first six bars of the national anthem should be played at the opening [alike] of the dominion and provincial legislatures of Canada, and at other state ceremonials when the governor-general or lieutenant-governor is acting on behalf of the sovereign.' The colonial secretary (Earl of Kimberley) in communicating this decision to the governor-general, and expressing his concurrence therein, observed, 'that while from the nature of their appointment [lieutenant-governors] represent on ordinary occasions the dominion government, there are, nevertheless, occasions (such as the opening or closing of a session of the provincial legislature, the celebration of her Majesty's birthday, the holding of a levée, &c.), on which they should be deemed to be acting directly on behalf of her Majesty, and the first part of the national anthem should be played in their presence.' [Sess. Pap. Ont. 1873, No. 67.]

Not being directly nominated or appointed by the sovereign, the lieutenant-governors of the provinces in Canada are not entrusted with the administration of the more eminent and personal prerogatives of mercy or of honour. Previous to confederation, the power of exercising the royal prerogative of pardon was con-

^k Despatch of the colonial secretary (Earl Carnarvon) to governor-general of Canada (Earl Dufferin), of Jan. 7, 1875; Can. Sess. Papers, 1875, No. 11, p. 38. 'Under the circumstances of the case, the lieutenant-governors of the provinces, holding their commissions from the governor-general, are not entitled to salutes from her Majesty's ships and fortifications within their respective provinces. (Despatch of the colonial secretary (Duke of Bucking-

ham) to Governor-General Monck, dated Oct. 19, 1868.) According to the official Table of Precedence in Canada, lieutenant-governors rank next after the general commanding her Majesty's troops within the dominion, and the admiral commanding her Majesty's naval forces on the British North American station. During their term of office they are styled 'his Honour.' *Ib.* July 23 and 24, 1868. See *ante*, pp. 317-322.

ferred upon the lieutenant-governors of the several provinces in British North America. But that power was withdrawn in 1867, not only by the revocation of the letters patent under which it was exercised, but also by the act of the Queen in assenting to the British North America act, which changed the status of lieutenant-governors in Canada, and annulled the powers formerly conferred upon them, except in so far as they were specially retained by that statute.¹ Since confederation, neither the prerogatives of mercy or of honour can be administered by the lieutenant-governors: they can only be exercised in Canada by the sovereign directly, or through her representative, the governor-general, by virtue of an express authority given to him in his commission or by instructions from the Crown.^m

Provincial executive authority.

Altered powers of lieutenant-governors.

It is, nevertheless, a mistake to infer, from the limited jurisdiction and functions assigned to the lieutenant-governors of the Canadian provinces under the British North America act, that they are not to be accounted as being in any degree representatives of the Crown. Though appointed to office by the governor-general in council under the great seal of Canada, their commissions run in the name of the sovereign.ⁿ The form of government which, by their oath of office, they are enjoined to administer, is monarchical; and their powers as lieutenant-governors proceed directly, as well as indirectly, from the Crown of Great Britain. In the several royal commissions appointing the governor-general of the dominion, from the period of confederation until October, 1878, the lieutenant-governors of

How far they represent the Crown.

¹ See Upper Can. Assem. Jour. 1839, App. v. 2, pt. ii. p. 625; Can. Sess. Pap. 1869, No. 16; B. N. Am. act, 1867, secs. 12, 14, 65.

^m See Canada Sess. Pap. 1877, No. 89. pp. 332-335. British Co-

lumbia Sess. Pap. 1878, p. 709. And see *post*, p. 593. But see 'Executive power case,' *ante*, p. 367.

ⁿ See the commission of the lieutenant-governor of Quebec, in Can. Senate Jour. April 8, 1878.

Provincial
executive
authority.

—
Lieut.-
governor's
powers

the provinces are expressly referred to, and they were directly authorised by those instruments 'to exercise from time to time, as they may judge necessary, all powers lawfully belonging' to the sovereign 'in respect of assembling or proroguing, and of dissolving the legislative councils or the legislative or general assemblies of those provinces respectively.'^o

'The Queen forms part of the legislature of each province, by the intermediary of the lieutenant-governor. It is in her name that the houses are called and prorogued, and that the laws are assented to.' In fact, the lieutenant-governors exercise towards the several legislatures 'royal functions, which the sovereign, as chief executive magistrate of the nation, as the first branch of parliament, exercises in England, and which none other than her representatives can exercise in a colony.'^p

under
royal com-
mission
and con-
federation
act.

In the revised commission issued, in October 1878, to the Marquis of Lorne, upon his appointment as governor-general of Canada, this clause, in reference to the powers and duties of the lieutenant-governors, was omitted. But this omission is not attributable to any intention on the part of the Imperial government to diminish the rightful authority of these officers, or to disconnect the particular functions of state in question from a direct relation to the Crown. The words were left out from the governor-general's commission at the suggestion of Mr. Blake, then minister of justice for Canada, and in consequence of representations addressed by him, as we have already seen, in June 1876, with a view to a general revision of the commission and instructions issued to the governor-general of Canada, so as to exclude from these instruments all superfluous and extraneous recitals, and to make them accord with

^o Earl of Dufferin's commission in Can. Com. Jour. March 28, 1873. See also the British North America act, 1867, secs. 61, 82, 88, 129.

^p Mr. Loranger, Q.C., in the Mer-

cer Case, Can. Sup. Ct. Rep. v. 5, pp. 598, 607. Mr. Bethune, *ib.* p. 588; Ch. Just. Richie, *ib.* p. 637. And see *ante*, pp. 336, 439.

existing constitutional usage. In his comments upon this clause in former commissions, since confederation, Mr. Blake remarks as follows: 'The provision giving these powers to the lieutenant-governors by the governor-general's commission appears somewhat objectionable, and it might perhaps be advisable to leave these matters to be dealt with by those officers under the British North America act, the eighty-second section of which in terms confers on the lieutenant-governors of the new provinces of Ontario and Quebec the power, in the Queen's name, to summon the local bodies, a power which no doubt was assumed to be continued to the governors of the other provinces.'^a Elsewhere Mr. Blake suggests that, if needful, a separate commission could be issued by the sovereign to the lieutenant-governors for this purpose; but he was clearly of opinion that that was unnecessary, because, in his judgment, full powers for the performance, on behalf of the Crown, of these acts of executive authority must be taken to have been conferred, either expressly or impliedly, by the British North America act.^r

Lieut.-
governor's
powers.

Inasmuch, then, as the Crown, with the sanction and by the express authority of the Imperial parliament, has authorised the lieutenant-governors of the provinces, 'from time to time,' 'by instrument under the great seal of the province,' to 'summon and call together' the several provincial legislatures, it equally devolves upon these high officers of state, 'in the Queen's name,' to open and to close these assemblies; and, in conformity with their instructions, or with the usage of parliament, and pursuant to their constitutional discretion, to give or to withhold the assent of the Crown to the bills enacted therein, or to reserve the same for the

They represent
the Crown
in the local legis-
latures.

^a Can. Sess. Pap. 1877, No. 13, p. 7. And see *ante*, p. 116.

Pap. 1877, No. 13; 1879, No. 181. And see further on this point, *ante*, p. 439.

^r Correspondence in Can. Sess.

Lieut.-
governors
may with-
hold the
royal as-
sent from
bills.

consideration of their superior officer, his excellency the governor-general.^a

It is worthy of notice that, since confederation, the lieutenant-governors in the provinces of Quebec and Ontario, while they have occasionally reserved bills for the consideration of the governor-general, have never 'withheld' the assent of the Crown from any bill passed by the provincial legislature.

In other provinces of the dominion it has been different. In Nova Scotia, Lieutenant-Governor Archibald had, on several occasions, in the years 1874 to 1883, withheld his assent to bills. In New Brunswick the same course was taken by Lieutenant-Governor L. A. Wilmot in 1870, 1871, and 1872, by Lieutenant-Governor Tilley in 1875 and 1877, and by Lieutenant-Governor R. D. Wilmot in 1882.

In British Columbia, in 1883, the promoters of a private bill which had passed the legislature were desirous that it should not become law, and moved in the assembly that the governor should be advised to withhold his assent to the same. But this motion was withdrawn, and the bill assented to.^t

So far, at least, as Nova Scotia is concerned (and doubtless so in the case of the other provinces) this unusual proceeding, on the part of the lieutenant-governor, was not attributable, in any instance, to a disagreement between himself and his constitutional advisers.

The British North America act, 1867, section fifty-five—as applied to the provincial constitutions by section ninety—expressly empowers a lieutenant-governor, in 'his discretion,' to 'withhold' the royal assent from any bill presented to him.

But the act of a lieutenant-governor, in withholding the assent of the Crown to a bill which has been passed

^a See *ante*, pp. 161, 440, 517. 108.

And see *Ld. Ch. Cairns*, in *Thé-
berge v. Laundry*, L. R. 2 App. Cas. 1883, p. 90.

^t *British Columbia Assem. Jour.*

by the legislative chambers—wherein a responsible minister should be able to exercise a constitutional influence in the control of legislation^u—is a difficult and delicate proceeding. It is one that must, obviously, be advised by some minister, who is in a position to become responsible for the same. If a lieutenant-governor should, for any reason, deem it imperative upon him to take such a course, and his ministers should not agree therein, he must be prepared to accept their resignation, and be able to form a new ministry, by whom the act proposed could be constitutionally advised and justified to both houses.^v

Lieut.-governors withholding assent to bills.

In regard to the action of Lieutenant-Governor Archibald, in Nova Scotia, I have been favoured with information which enables me to state the circumstances under which he exercised the royal prerogative in withholding his assent to bills in the cases above mentioned.

Exercise of this prerogative in Nova Scotia.

In every one of the instances wherein he interposed the veto of the Crown upon provincial legislation, he acted under the advice of his ministers, who agreed with him in an anxious desire to keep within the bounds assigned to the provincial legislature by the British North America act, and to refrain from enacting any measure to which exception could be justly taken, on the ground of its being in excess of the powers conferred upon the local legislatures by the Imperial statute.

The bills in question, from which Lieutenant-Governor Archibald withheld the sanction of the Crown, were bills which, after they had passed both houses, appeared upon careful examination, and on being subjected to the scrutiny of the lieutenant-governor as a responsible officer of the dominion, to be *ultra vires*, or to be other-

^u See Todd, Parl. Govt. in Eng. 374, 390.
v. 2, pp. 305, 318, new ed. v. 2, pp.

^v See *ante*, p. 522.

Lieut.-
governors
with-
holding
assent to
bills.

wise objectionable for reasons that had escaped notice during their progress through the legislative chambers.

Whereupon it was agreed by the local administration, as the least objectionable method of obviating the difficulty, to advise the lieutenant-governor to reject these bills. Otherwise they would certainly have been disallowed by the dominion government, after having been in force up to the time of their disallowance.

Had the lieutenant-governor been advised, instead, to reserve these bills for the consideration of the governor-general in council, the dominion government might have objected that they had been improperly invited to decide in a case which was within the competency and jurisdiction of the lieutenant-governor by the tenor of his commission to determine.

Ontario
prece-
dents.

Thus, in 1873, the dominion government took exception to two local bills to incorporate certain Orange societies, which the lieutenant-governor of Ontario had reserved for the consideration of the governor-general. The dominion minister of justice reported that these bills were clearly within the competence of the local legislature, and that the local government ought to have assumed the responsibility of disposing of them. Accordingly, no action was taken upon these bills by the governor-general in council.^w

Quebec
precedent.

In 1878, the lieutenant-governor of Quebec reserved a bill, passed by the legislative chambers, to give certain powers to 'The Quebec, Montreal, Ottawa, and Occidental Railway.' Ministers had promoted this bill, but the lieutenant-governor was decidedly opposed to it on broad grounds of principle, and he deliberately refused to assent to it. For this and other reasons the lieutenant-governor dismissed the ministry, and appointed a new administration who agreed with the

^w Ontario Sess. Pap. 1st Sess. 1874, No. 19. And see *ante*, p. 522.

governor in disapproving of this railway bill. The incoming premier, 'being in doubt as to the lieutenant-governor having the right of his own accord, *ex proprio motu*, to exercise the prerogative of veto, and thus to decide finally on the fate of a measure passed by both houses, when the British North America act of 1867 seems to leave such power to the governor-general,' concurred with his predecessor, and advised that the bill should be reserved.^x The dominion government, however, took no action upon it. In the next session of the Quebec legislature, another bill of an unexceptionable character was proposed by the new ministers and became law.^y

Lieut.-governors withholding assent to bills.

It would have been more in accordance with constitutional doctrine, and in agreement with precedents previously established in other provinces of the dominion, if M. Joly, whose ministry replaced the administration dismissed from office by the lieutenant-governor of Quebec, had advised that the assent of the Crown should have been withheld from this obnoxious railway bill, instead of reserving it for the consideration of the governor-general.^z

Where this prerogative should have been used.

In the distribution of powers—whether appertaining to the federal or the provincial constitutions—under the British North America act, 'the Crown of the United Kingdom of Great Britain and Ireland' is recognised as the source of all executive authority throughout the dominion.

And the lieutenant-governors—who are sworn to fulfil the duties of their station by oaths 'similar to those taken by the governor-general'—are, within the limits of their respective governments, and subject to the supreme authority of the governor-general, ex-

The Crown the source of all executive authority in Canada.

^x Quebec Leg. Assem. Jour. 1877-78, pp. 230, 272.

^z See Todd, Parl. Govt. v. 2, p. 319, new ed. v. 2, pp. 392-3.

^y Quebec Stats. 41 & 42 Vic. c. 3.

Lieut.-
governors
represent
the
Crown.

pressly authorised by the Imperial statute to exercise 'all powers, authorities, and functions' previously 'vested in or exercisable by the respective governors or lieutenant-governors of those provinces' prior to confederation, 'so far as the same are capable of being exercised, after the union, in relation to' the particular provinces. This constitutes and empowers the lieutenant-governors to be the appropriate channels to represent and administer the authority of the Crown in their several provinces; and to convey, through subordinate functionaries, that authority in all matters wherein it is necessary for the Crown to act through the provincial executive.^a Thus, through 'the discipline and subordination which should connect together in one unbroken chain the Crown and its representative in the province, down to the lowest functionary to whom any portion of the powers of the state may be confided,' the 'royal authority,' assigned to and represented by a duly accredited officer, is 'most distinctly admitted as one of the component and inseparable principles of the social system' in British North America; and every British subject throughout the dominion shares equally with his brethren in the

^a B. North Am. Act, 1867; preamble and secs. 58, 62, 65, and 129. Ontario Rev. Stats. c. 15. And see the opinions by the Court of Chancery of Ontario, as to the Attorney-General of the province being the proper officer of the Crown to assert the rights of the Crown in provincial courts, even in respect of the violation of rights created by a dominion statute; notwithstanding that, possibly, the Attorney-General of the dominion might have a concurrent right to sue. 20 Grant Ch. pp. 37, 510; *ib.* v. 28, p. 77. See also Chancellor Spragge's judgment in the Muskoka Mill Co. v. The Queen, which was based on a petition of

right under the Ontario Act of 1872 (Grant, Ch. v. 28, p. 579. See also Mercer Case, Can. Sup. Ct. Rep. v. 5, p. 538). But by a later decision on appeal, in the case of the Attorney-General v. The Intern. Bridge Co., it was affirmed that the provincial Attorney-General could only interfere to protect the rights of the citizens of Ontario, and that he had no jurisdiction to claim the fulfilment of obligations created by a dominion statute, Ont. App. Rep. v. 6, p. 537. To same effect see Mousseau, Att.-Gen. v. Bate, L. C. Jurist, v. 27, p. 153; Loranger, Att.-Gen. Quebec, v. Montreal Telegraph Co., L. News, v. 5, p. 429.

mother-land in the protection and blessings of monarchical rule.^b

But the authority of the Crown, in the provinces as well as in the dominion, is exercised and administered in conformity with the obligations of 'responsible government.' That system, as we have already seen, was introduced into all the British North American provinces prior to confederation. Accordingly, in the sections of the British North America act which treat of the executive power in the provincial constitutions, it is declared that the executive council of each province 'shall be composed of such persons as the lieutenant-governor, from time to time, thinks fit; and that the powers, authorities, and functions heretofore vested in or exercisable by the several governors or lieutenant-governors of these provinces, with the advice or with the advice and consent of or in conjunction with the respective executive councils, or any members thereof'—words identical with those used in a preceding clause to define the constitutional relations between the governor-general and 'the Queen's privy council for Canada'—shall continue to be discharged in like manner, after confederation, by the lieutenant-governors, 'as far as the same are capable of being exercised, after the union, in relation' to the provincial governments.^c These words unmistakably show that the Imperial parliament has ratified and enjoined a continuance of the exercise of executive power in the various provinces of the dominion, in accordance with the usages of responsible government; and that it contemplates that the lieutenant-governors therein should occupy, towards their

Responsible government in the provinces.

^b See Lord Glenelg's despatch to the Earl of Gosford, in Com. Pap. 1836, v. 39, p. 7. And his despatch to Lieutenant-Governor Head, *ib.* 1839, v. 33, p. 5.

^c B. N. Am. Act, 1867, secs. 63, 64. Compare secs. 12 and 65 of the act. And see Sir John A. Macdonald's remarks on this point, in Com. Pap. 1878-79, v. 51, p. 152.

executive council and towards the local legislature, the identical relation occupied by the governor-general in Canada and by the Queen in the United Kingdom towards their several privy councils and parliaments.

Judicial
decisions
as to
powers of
a lieu-
tenant-
governor.

The position herein claimed for the lieutenant-governors of the provinces in Canada—that, as being the chief executive officers in the local governments, they do represent the Crown in divers weighty and important public functions, both legislative and administrative—has been repeatedly acknowledged and sustained by decisions of the courts, and by legislative enactments, wherein the right and duty of a lieutenant-governor to administer such portions of the royal prerogative as are essential to the conduct of a government founded upon a monarchical basis have been unequivocally asserted.

Escheats.

Thus, in 1874 a controversy arose between the dominion government and the provincial authorities, in Ontario and in Quebec, in respect to escheats. An act respecting escheats and forfeitures was passed by the Ontario legislature in that year, but was disallowed by the governor-general. It was afterwards re-enacted.^d By a decision of the court of Queen's bench of the province of Quebec, in 1876, upon an appeal from an inferior court, the right of the province to the control of escheats and forfeitures, within the province, was affirmed.^e Whereupon it was agreed, between the dominion and provincial governments, that—until or unless there should be a judicial decision establishing a contrary principle—'lands and personal property in any province, escheated or forfeited by reason of intestacy, without lawful heirs or next of kin, or other parties entitled to succeed, are subjects appertaining to the province, and within its legislative competency;' while, on the other hand, 'lands and personal property forfeited to the Crown for treason, felony, or the like, are subjects appertaining to the dominion, and within its legislative competence.'^f This case involved the question of the status of a lieutenant-governor in a province of Canada, and the extent to which such an officer was competent to act on behalf of the Crown, and to administer a prerogative inherent in the Crown.

^d R. Stat. Ont. 1887, c. 95.

^e Church v. Blake, 2 Quebec L. Rep. p. 236.

^f Can. Sess. Pap. 1877, No. 89,

pp. 88–105. And see *ib.* p. 232. A law to the same effect was passed by the legislature of the province of New Brunswick in 1877, c. 9.

It affirmed the principle—in opposition to the contention of the dominion government, in the first instance—that while certain prerogatives, exercisable at the discretion of the sovereign, though not without the advice of responsible ministers (such as the prerogatives of mercy and of honour), ought not to be administered by a lieutenant-governor, yet that the prerogative in matters of escheat might be suitably exercised, on behalf of the Crown, by the chief executive officer in the province, holding a limited commission, which runs in the name of the sovereign. The same point was affirmed by the court of chancery of Ontario in the Mercer case.^g But on November 14, 1881, this judgment was reversed, on appeal, by the dominion supreme court, which decided—the chief justice and Mr. Justice Strong dissenting—that the administration of the royal prerogative in matters of escheats was not within the competency of a provincial executive; that by consequence the Ontario escheat act (revised statutes, c. 94) was *ultra vires*; that the Crown in Canada still retained this prerogative, inasmuch as no Imperial statute had divested her Majesty of the same, neither had it been voluntarily surrendered by the Crown. In England the sovereign can dispose of the title to escheated lands, when it accrues to the Crown, at pleasure, and without the control of parliament, although, by law, any revenues from escheats, after the exercise of the prerogative, in the grant or disposal of such property, are paid in to the consolidated fund. In like manner in Canada before confederation, the sovereign had ceded to the provinces the revenues arising from escheats, but had never divested herself of her prerogative right, as an act of grace and favour to particular individuals. In the opinion of the supreme court, pursuant to sections one hundred and two and one hundred and twenty-six of the British North America act, the right of appropriating the revenues from escheats remains with the dominion government and is not transferred to the provinces under section one hundred and nine. It also appertains to the governor-general, as the direct and immediate representative of the sovereign, to exercise this prerogative for reasons similar to those which regulate the administration of the prerogatives of mercy and of honour.^h

In Nova Scotia, since confederation, the governor-general, as the immediate representative of her Majesty, has assumed the right to appropriate escheats, and has acted on the customary practice of recognising the claims of relatives who nevertheless were not heirs-

^g Att.-Gen. v. O'Reilly, Ch. Rep. v. 6, p. 576.

v. 26, p. 126. This decision was ratified by the Ontario Court of Appeal, in March 1880, Ont. App. Rep.

^h Can. Sup. Ct. Rep. v. 5, p. 538. See *ante*, p. 582.

Escheats. at-law.ⁱ On February 15, 1882, the Nova Scotia government were informed, by direction of the governor-general in council, that unless an act passed by the local legislature in 1881 concerning Crown lands, and which authorised the provincial government to represent the Queen in matters of escheat, were repealed in accordance with the judgment of the supreme court, it would be disallowed.^j This act was accordingly amended in 1882.

The Ontario government, however, carried the Mercer case on appeal to the judicial committee of the privy council, which reversed the decision of the supreme court of the dominion, affirmed that of the Ontario courts of chancery and appeal, and declared, by implication, that escheated lands in any province revert to the provincial and not to the dominion government, as representing the Crown in this particular. The judgment turned upon the meaning of the word 'royalties' in the one hundred and ninth section of the British North America act. Their lordships were of opinion that this term should be allowed its primary and appropriate sense as to (at all events) all the subjects with which it is there associated—lands as well as mines and minerals—an interpretation which also seems to be the most consistent with the purport of this statute, which assigns to the several provinces all other ordinary territorial revenues of the Crown arising therein.^k

Legisla-
tion on
this ques-
tion.

It has also been determined, in conformity with the opinion of the law officers of the Crown in England—and in opposition to the opinion expressed by the dominion minister of justice—that lieutenant-governors of the provinces are competent to exercise the prerogative right of issuing marriage licenses, and the provincial legislatures to pass laws regulating the same.^l This has since been ratified by the revised statutes of Ontario, c. 131, sec. 5.

By the British North America act, 1867, sec. 91 (26), the dominion parliament is exclusively empowered to legislate in regard to 'marriage and divorce,' e.g., to determine what shall constitute a legal marriage, and what marriages shall be forbidden as unlawful; likewise

ⁱ Mr. Macdougall, in Ont. App. Rep. v. 6, p. 580.

^j N.S. Leg. Coun. Jour. 1882, App. No. 13.

^k L. T. Rep. N.S. v. 49, p. 312; 8 L. R. App. Cas. p. 767.

^l Can. Sess. Pap. 1877, No. 89, p. 339.

to determine what shall constitute valid grounds of divorce. Marriage and divorce legislation in Canada.

By the one hundred and first section of this act the dominion parliament is also competent to establish a dominion court of divorce and matrimonial causes. In the opinion of the English Crown law officers (above cited) the dominion powers embrace 'all matters relating to the *status* of marriage, between what persons and under what circumstances it shall be created, and (if at all) destroyed.'^m But the ninety-second section of the British North America act (sub-sec. 12) provides that 'solemnisation of marriage in the province' is to be regulated by provincial law, so that the grant of marriage licenses and the prescribing of the mode and form in which marriages shall be solemnised appertains exclusively to the provincial legislatures.ⁿ

The formal mode of contracting marriages is no doubt a fit subject for the discretion of the local legislatures, because, as a general rule, no difference of mere form can invalidate a marriage lawfully contracted in any part of the Queen's dominions. It is very different in regard to the essential conditions of marriage. In this respect it is of vital importance that a uniform law should prevail throughout the realm, and that marriages legally contracted in one colony should not be inoperative for all legal purposes in another.^o It is for this reason that legislation upon the essentials of marriage and divorce is conferred, in Canada, exclusively upon the dominion parliament.

^m See Can. Act, 42 Vic. c. 79, for relief of Eliza M. Campbell. And see Dom. Ann. Reg. for 1879, p. 135. See also McDougall v. Campbell, 41 Q. B. N. C. p. 332. For existing law respecting marriage and divorce in all the Canadian provinces, see Can. L. T. v. 1, p. 665, and Can. Stat. 1882, c. 42.

ⁿ See Can. Sess. Pap. 1882, No. 170, and Judge Gwynne's observations in Can. Sup. Ct. Rep. v. 3, p. 568.

^o See Duke Newcastle's despatch of Feb. 19, 1861, to Governor of Victoria, Vic. Leg. Assem. Jour. 1860-61, App. No. 58.

In the United States, where questions in relation to 'marriage and divorce' are regulated by the law of each state, and not by congress, the utmost confusion and mischief prevails, owing to the clashing of various discordant laws on this subject.^p

Lieut.-
governor
may remit
forfeiture
in certain
cases.

The Ontario revised statutes, c. 15, sec. 15, empower the lieutenant-governor of the province to remit the forfeiture or penalty, in certain civil cases, which would otherwise accrue to the Crown.

May
alter
the pro-
vincial
seal.

Pursuant to the British North America act, sec. 136, and under the authority of the dominion statute, 1877, c. 24, which was passed to remove doubts on the subject, so far as the dominion parliament was competent to determine the same, the lieutenant-governor in council, in each province of Canada, is declared to have the power of appointing, and of altering from time to time, the great seal of the province.^q

The judges of the supreme court in Nova Scotia pointed out in 'The Great Seal' case, in 1877, that her Majesty, in assenting (through the governor-general) to certain provincial acts, authorising 'her lieutenant-governor' to exercise her prerogative right in the use of the great seal in and for the province—'to the extent in which it is necessarily conferred on that high officer by the statute'—did expressly delegate to and empower lieutenant-governors to exercise certain prerogative rights appropriate to the office of the representative of the sovereign in the particular province.^r The dominion supreme court, in reviewing the decision in 'The Great Seal' case, in 1879, did not contravene this position. (See *ante*, p. 339.) In fact, the chief justice of the court, in the Mercer case, in 1881, pointed out that 'the great seal is never attached to a document except to authenticate an act done in the Queen's name.'^s

And in the case of *Regina v. Amer et al.*, it was held by Mr. Justice Wilson that, since confederation,

^p See Int. Rev. Aug. 1881, p. 139; Princeton Rev. Jan. 1882, pp. 90-99; *ib.* Nov. 1883, p. 227; Am. L. Rev. N.S. v. 17, p. 166.

Nova. Scotia Assem. Jour. 1878, App. No. 16.

^r See Can. Sess. Pap. 1877, No. 86, p. 36.

^q Can. Sess. Pap. 1877, No. 86.

^s Sup. Ct. Rep. v. 5, p. 638.

the lieutenant-governor of Ontario (equally with the governor-general of the dominion) is capable of exercising the prerogative right of issuing special commissions to authorise the holding of courts of assize, for the trial of criminal offences.^t

Lieut.
governor
may
authorise
the hold-
ing of
courts.

This point has since been enforced with great ability—and as a principle equally applicable to all the provinces in the dominion—by the judgments rendered in the supreme court of British Columbia, on June 26, 1880, upon the question of the validity of a trial for murder which was held before a court in British Columbia, but which had not been formally opened by a commission issued by the lieutenant-governor. The court were unanimously agreed that such a commission was necessary to the due order of criminal procedure; and that the lieutenant-governor was constitutionally competent, under the British North America act of 1867, to issue the same.^u Subsequently, however, by the British Columbia statute, 1879, c. 12, sec. 14 (approved by the dominion government in May 1880), the lieutenant-governor was empowered to authorise the holding of such courts ‘with or without commissions.’^v

In like manner, the lieutenant-governors of the provinces have suitably exercised the right of appointing justices of the peace, in their respective provinces, pursuant to provincial acts passed under the authority of sub-section 14 of the British North America act, 1867, clause 92. Legislation to this effect passed in Ontario in 1868; in Quebec in the first session of 1870; in New Brunswick by the revised statutes of 1876 (c. 29), which validates all such appointments by the lieutenant-governor since July 1, 1867; and in Nova Scotia in 1880, by c. 17, which has a similar retrospective clause.

May
appoint
justices of
the peace.

These details are given because of an extraordinary decision of the judge of the county court in Digby, Nova Scotia, which asserts that the power to appoint justices of the peace in the several provinces of the

^t Ont. Q. B. Rep. v. 42, p. 391.

behalf of the Crown.

^u This judgment was afterwards published by Mr. Justice Crease, in Victoria, B. C., in the name and on

^v Can. Sess. Pap. 1882, No. 141, p. 205.

dominion rests solely with the governor-general.^w The dominion government, in leaving these provincial acts to their operation, unmistakably show their approval of them. The constitutional question has since been affirmed, in favour of the provincial governments, by the court of Queen's bench in Ontario.^x

It is evident, therefore, that, in a modified but most real sense, the lieutenant-governors of the Canadian provinces are representatives of the Crown.

Control
over lieu-
tenant-
governors
by central
govern-
ment.

Let us now inquire into the extent to which these lieutenant-governors 'are more immediately responsible to the governor-general in council,' and into the duty which properly devolves upon the central government in any group of confederated colonies to exercise towards the subordinate provinces the degree of constitutional oversight and control which the Imperial executive maintains over the whole empire.

Such supervision in Canada would, as we have seen, sometimes necessitate a direct interference with the proceedings of the provincial authorities, and the disallowing of acts wherein they had transgressed the assigned limits of their powers, or had sought to give effect to principles which were inimical to the interests of sister provinces or of the confederation generally.

Super-
vision by
central
govern-
ment in
provincial
matters.

But in addition to the control which, under these circumstances, would be appropriately fulfilled by the central government, there is a further duty which the existing relation between a central and a subordinate government obviously entails upon the former. Having been constitutionally empowered to represent towards subordinate provinces, associated together in confederation, the supreme authority of the Crown, and to act

^w Doutre, Const. of Canada, p. 54.

^x Regina v. Bennett, Ont. Rep. v. 1, p. 458.

towards them in that behalf, the central government should be prepared to afford to the several subordinate governments the benefit of its interposition and advice upon all matters, whether of administration or of legislation, wherein the same could be advantageously rendered.

Relations
between
the
central
and local
legisla-
tures.

The extent to which such interference would be justifiable must, however, altogether depend upon the degree of self-government accorded by the sovereign power to the particular provinces. There could be no interference beyond these limits without an undue encroachment upon the confederation compact. But, even where direct and authoritative interposition would be objectionable or undesirable, the paternal position occupied by the central executive towards the provincial governments would naturally suggest the propriety of intervening by advice or remonstrance, whenever it might appear that the mature, experienced, and impartial counsels of the supreme government would be helpful.

In like manner, the local ministries and parliaments in the self-governing colonies of Great Britain—even where representative institutions of the most liberal type exist—not infrequently have sought the advice of the Imperial government to help them in the solution of difficult constitutional questions; and this advice is rarely refused, even when the question is one that must be locally decided.^y

It would be of immense advantage to all subordinate provinces under a federal government, now or hereafter to be established in any part of the empire, if the local authorities could appeal, with similar confidence and assurance of receiving wise counsel and true guidance, to the central government, whenever a

^y See *ante*, pp. 156, 200.

Relations
between
the
central
and local
legisla-
tures.

necessity for the same might arise. It should, therefore, be the aim and obligation of every supreme federal government to supply to its subordinate provinces an equal measure of intelligent and impartial aid, in the endeavour to solve the problems which are continually arising in the working of free institutions, to that which the Imperial government paternally accords to all the colonies and dependencies of the Crown.

Through
the fede-
ral secre-
tary of
state.

Such a function, whether it be discharged for the purposes of advice, admonition, or restraint, would, by constitutional analogy, be fittingly entrusted to the secretary of state of the federal government, who is the proper channel and representative to the subordinate provinces of the central and supreme authority.

In conformity with the constitutional maxim that 'advice and responsibility must go hand in hand,'² it is evident that, whenever a central government undertakes to advise or to control a provincial government, the central executive must be accountable for the same to the central parliament. The action which it may be expedient for a central parliament to take under such circumstances, can only be determined by a consideration of the respective limits assigned by Imperial authority to provincial and federal jurisdiction.

Value of
Canadian
prece-
dents to
other
federal
govern-
ments.

The federal system was unknown in Great Britain or her colonies, until it was introduced and applied to the colonies in British North America by the Imperial act of 1867. Since then an attempt has been made to establish a similar system in South Africa; but this project is, for the present, in abeyance. Probably, ere long, the accomplishment of Australian federation will unite together under a form of government resembling that which has been successfully applied to the older colonies upon the American continent. Meanwhile, a

² Todd, *Parl. Govt.* v. 1, p. 53, new ed. v. 1, p. 118.

study of the cases that have arisen under the Canadian constitution cannot but be serviceable to all who are interested in complex questions of colonial government.

In 1878, a much controverted case arose in Canada, under the British North America act of 1867, affecting the relations between the dominion and provincial governments, so far as the office of lieutenant-governor is concerned. Before it was finally disposed of, the counsel of the Imperial government was requested, in view of the importance of the decision as a precedent for future guidance. It will therefore be profitable to call attention to the facts of this case, and to point out their bearing upon the general questions now under consideration.

Office of
lieuten-
ant-go-
vernor in
relation to
dominion
executive.

In March, 1878, his Honour Luc Letellier, the lieutenant-governor of the province of Quebec, in the exercise of his constitutional discretion, dismissed his ministers, and summoned other advisers to his counsels. The circumstances under which M. Letellier exercised this prerogative of the Crown were afterwards reported by himself to the governor-general.

Case of
Lieuten-
ant-Governor
Letellier.

The lieutenant-governor alleged that, in general, the recommendations which from time to time he addressed to his ministers upon public affairs had not received from them the consideration which was due to suggestions emanating from the representative of the Crown.

That his ministers had taken steps in regard both to administrative and legislative measures, not only contrary to his representations, but even without previously advising him of what they proposed to do. This was notably exhibited in the case of a bill which contained provisions whereby her Majesty's subjects would have been deprived of their undoubted right to the protection of the courts of law, in matters of dispute with the provincial government.

That the bill in question, which was intended to substitute the power of the executive for that of the judiciary, in determining certain claims under a railway act, had been introduced by ministers into the legislative assembly, and passed through both houses, without the previous consent of the lieutenant-governor, and notwithstanding his strenuous opposition to the measure, which he deemed to be an arbitrary and illegal infringement of vested rights.

Letellier
case.

That ministers had, he believed, yielded to a corrupt pressure, brought to bear on them by irregular combinations of members, for political considerations, to promote a lavish expenditure of public money in subsidising railways, contrary to the advice of the lieutenant-governor, who warned them of the detrimental result to the province of such objectionable influences.

The lieutenant-governor further alleged that he had repeatedly remonstrated with his ministers before proceeding to extremity with them, but without avail. At length he was compelled to declare that he could no longer repose confidence in them, and must place the administration of the government in other hands.

After the dismissal of the De Boucherville ministry, the leader of the opposition in the assembly, M. H. G. Joly, was called upon to form a new administration. He succeeded in the attempt, but being unable to carry on the government with a powerful majority against him in the assembly (his supply bill having been rejected by a vote of thirty-two to thirteen), he applied for a dissolution of the legislature, which was granted by the lieutenant-governor.

The new assembly met in June, 1878. Parties were very evenly balanced, and M. Joly's ministry was repeatedly saved from defeat, on questions of confidence, only by the casting vote of the speaker, though in one instance, on a vote against the government, it was defeated by a majority of one.^a But, as the session proceeded, political strife was relaxed, and ministers were enabled to complete the business of legislation.

The act of the lieutenant-governor, in dismissing the De Boucherville administration, gave great umbrage to the political party then in the ascendant in Lower Canada. The ex-ministers assigned reasons to the legislature for their removal from office, which reflected injuriously upon the motives and conduct of the lieutenant-governor. M. Letellier regarded these explanations as being partial and erroneous. He therefore forwarded to the Earl of Dufferin, the governor-general, a memorandum, containing explanations in justification of his proceedings, wherein he showed that the action of his late advisers had endangered the prerogatives of the Crown, and jeopardised the welfare of the province.

A counter-statement, in rebuttal and refutation of certain alleged inaccuracies in M. Letellier's memorandum, was afterwards forwarded to the governor-general by the ex-premier, M. De Boucherville. And, at a subsequent period, a petition was addressed to the governor-general in council, by certain members of the ex-ministry, praying for the dismissal of his honour the lieutenant-

^a Quebec Jour. 1878, June 11, p. 16.

governor of the province of Quebec. This petition, with an answer made to the statements therein by M. Letellier and a rejoinder by the petitioners, were transmitted, at different periods, by the governor-general, without comment, to the senate and house of commons of Canada then in session.^b Letellier case.

The dominion government having refrained from taking any action upon these petitions of complaint against the lieutenant-governor, the political friends of the ex-ministers determined to bring the matter into discussion in both houses of the Canadian parliament. And here it should be stated that the conservative party, which had espoused the cause of M. De Boucherville, was in a majority in the senate, but in a minority in the house of commons.

On April 11, 1878, as an amendment to the question for going into committee of supply, it was moved by Sir John Macdonald (then leader of the opposition), seconded by Mr. Brooks, to resolve, that the recent dismissal by the lieutenant-governor of the province of Quebec of his ministry was, under the circumstances, unwise, and subversive of the position accorded to the advisers of the Crown since the concession of the principle of responsible government to the British North American colonies. This motion led to a protracted debate; but, on April 15, it was negatived by a large majority.

On the same day, the leader of the opposition in the senate (Mr., now Sir, Alexander Campbell), seconded by senator Bellerose, moved to resolve, that the course adopted by the lieutenant-governor of the province of Quebec towards his late ministry was at variance with the constitutional principles upon which responsible government should be conducted. This was met by an amendment, proposed by supporters of the Mackenzie administration, to substitute a resolution to declare that, 'under the rule of our constitution, the federal and the provincial governments, each in their own sphere, enjoy responsible government equally, separately, and independently; therefore, under existing circumstances, this house deems it inexpedient to offer any opinion on the recent action of the lieutenant-governor of the province of Quebec, or of his late ministers.' This amendment was negatived by a strict party vote, and the original motion agreed to.^c

The two houses were thus divided upon the merits of the case;

^b See Senate and Commons Jour. March 26 and April 8, 1878; Can. Sess. Pap. 1879, No. 19; *ib.* 1880, No. 18; Correspondence laid before the Imperial parliament re-
specting the case of M. Letellier. Com. Pap. 1878-79, v. 51, p. 45.
^c Senate Jour. April 15 and 16, 1878.

Letellier
case.

and no further proceedings were taken upon it during that session of the dominion parliament.

Shortly afterwards, a dissolution of the dominion parliament occurred, the existing parliament being about to expire by efflux of time. The general elections went against the party in power; and the conservative party, headed by Sir John A. Macdonald, were triumphant. The Mackenzie administration accordingly resigned office, and Sir John A. Macdonald was appointed premier of the incoming ministry.

The new parliament met on February 13, 1879. Ministers took no steps in furtherance of the policy they had advocated when in opposition for the removal of Governor Letellier. But the question was mooted by one of their supporters, who submitted to the house of commons a motion, identical in terms with that proposed in the previous session by Sir J. A. Macdonald, and then defeated by a majority of thirty-two. On March 14, 1879, this motion was agreed to by a majority of eighty-five.

Whereupon Sir John A. Macdonald informed the governor-general (the Marquis of Lorne), that in the opinion of ministers, after the resolution of the senate last session, and that of the house of commons in the present session, 'the usefulness of M. Letellier, as lieutenant-governor of Quebec, was gone,' and they advised his removal from office. 'After such a vote,' they urged, 'it must be obvious that he cannot either with profit or advantage be maintained in his position.' 'Even if their opinion had been adverse to that arrived at by parliament,' the ministry considered that they were 'bound to respect that decision, and to act upon it as they have done by advising the removal.'⁴

The governor-general demurred to this proposition. He objected to the policy which dictated the advice, and believed that 'the dismissal of the lieutenant-governor would set a dangerous precedent.' In this dilemma, at the suggestion of the premier, it was agreed to refer the matter to her Majesty's government for their consideration and instructions; inasmuch as the question was new, and the decision thereon would settle for the future the relations between the dominion and provincial governments, so far as concerns the office of lieutenant-governor.

In the words of the governor-general, which were assented to by Sir J. A. Macdonald, 'to dismiss the lieutenant-governor for acts for which M. Joly has declared himself to be responsible to the provincial legislature, is a new exercise of the federal power, and as it affects the interpretation of an Imperial act, which carefully

⁴ Com. Pap. 1878-79, v. 51, pp. 148-152.

guards provincial interests,' it was expedient that an authoritative expression of the views of her Majesty's government should be obtained, with reference to the powers given by the British North America act of 1867, to the governor-general, for the dismissal of a lieutenant-governor. Letellier case.

In support of the advice tendered by ministers for the removal of M. Letellier, the premier forwarded a memorandum on the subject to the governor-general, to be communicated to the secretary of state for the colonies.

When M. Letellier learnt that the question had been referred to the consideration of the Imperial government, he addressed a letter, dated April 18, 1879, to the dominion secretary of state, containing further explanations in regard to his conduct, in the matter of complaint, for the information of the governor-general. Herein, after rehearsing the facts of the case, he submitted an order in council, passed by the Quebec government, which asserted 'that the action of the lieutenant-governor of the province of Quebec, in dismissing his ministers and calling others in their stead, is a purely provincial matter, affecting in no way federal interests, and is not one of the causes contemplated in the fifty-ninth section of the British North America act, as justifying the removal of [a] lieutenant-governor.'^e

It was further insisted upon, by the Quebec government, that 'the maintenance of local and provincial autonomy and independence imperiously demands that questions of purely local and provincial interest should not be subjected to the control and influence of the federal legislature and the federal government.'^f

In order to watch the proceedings that might be taken by the Imperial authorities upon this case, M. Joly, the Quebec prime minister, proceeded to England to represent the lieutenant-governor personally, and the executive government of the province generally, in their efforts to protect the autonomy of Quebec. The dominion ministry, meanwhile, had despatched one of their number to London, to represent the case on their own behalf.

Upon his arrival in London, the Quebec premier suggested that a reference of the question to the judicial committee of the privy council would be generally acceptable in Canada, on account of the profound respect and confidence entertained in Canada, as elsewhere, for the decisions of that tribunal. The secretary of state for the colonies, however, was not of opinion that this course was advisable. He considered the present case closely analogous to that of the New Brunswick school act; upon which, in 1872, the Canadian house

^e Com. Pap. 1878-79, v. 51, pp. 155-158.

^f *Ib.* p. 168.

Letellier
case.

of commons sought to obtain the opinion of the judicial committee. 'It was then decided that, there being nothing in the case which gave the Queen in council any jurisdiction over the question, her Majesty could not with propriety be advised to refer to a committee of the privy council a question which the Queen in council had no authority to determine, and on which the opinion of the privy council would not be binding on the parties in the dominion of Canada.'²

Sir M. Hicks-Beach, her Majesty's secretary of state for the colonies, in a despatch dated July 3, 1879, conveyed to the Marquis of Lorne the conclusions of her Majesty's government, upon his request for instructions in regard to the Letellier question.

The application for instructions, in this very exceptional case, was approved; although, as a rule, whatever affects the internal affairs of the dominion should be dealt with by the government and parliament of Canada. Bearing in mind this rule, the Imperial government refrained from expressing any opinion upon the merits of this case, and declined to interfere with the exercise of the powers conferred upon the governor-general, by the British North America act, for determining the same.

But, in view of the importance of the precedent which may be established by the decision thereon, her Majesty's government would not withhold their opinion on the abstract question of the function and responsibilities of the governor-general, in relation to the lieutenant-governor of a province under the Imperial statute.

Accordingly, the despatch proceeds to state that 'there can be no doubt that the lieutenant-governor of a province has an unquestionable constitutional right to dismiss his ministers, if, from any cause, he feels it incumbent upon him to do so. In the exercise of this right, as of any other of his functions, he should of course maintain the impartiality towards rival political parties which is essential to the proper performance of the duties of his office; and, for any action he may take, he is (under the fifty-ninth section of the British North America act) directly responsible to the governor-general.'

In deciding whether the conduct of a lieutenant-governor merits removal from office, the governor-general—as in the exercise of other powers vested in him by the Imperial statute—must act 'by and with the advice of his ministers.'

Though the position of a governor-general would entitle his opinion on the subject 'to peculiar weight, yet her Majesty's government do not find anything in the circumstances which would justify him in departing in this instance from the general rule, and declin-

² Com. Pap. 1878-79, v. 51, p. 165. And see *ante*, p. 459.

ing to follow the decided and sustained opinion of his ministers, who are responsible for the peace and good government of the dominion to the parliament, to which (according to the fifty-ninth section of the statute) the cause assigned for the removal of a lieutenant-governor must be communicated.' Letellier case.

On the other hand, the secretary of state advises the governor-general to request his ministers to review their action in this case ; and to satisfy themselves whether, after all that has passed, it is 'necessary for the advantage, good government, or contentment of the province, that so serious a step should be taken as the removal of a lieutenant-governor from office.' 'The spirit and intention' of the Imperial statute clearly require that the tenure of this high office 'should, as a rule, endure for the term of years specifically mentioned ; and that not only should the power of removal never be exercised except for grave cause, but that the fact that the political opinions of a lieutenant-governor had not been, during his former career, in accordance with those held by any dominion ministry who might happen to succeed to power during his term of office, would afford no reason for its exercise.'

The long interval which had unavoidably elapsed between the mooted of this complicated question and its final settlement, might, it was suggested, be useful, not only in affording time for its thorough comprehension, but also in permitting 'the strong feelings, on both sides, which have been often too bitterly expressed, to subside.'^h

After the receipt of this despatch, the governor-general, on July 14, 1879, requested his ministers to reconsider their advice, in view of the remarks contained therein, and likewise of 'the support afforded in the province of Quebec to M. Joly, the minister who is by constitutional practice responsible for the action of the lieutenant-governor.'

On July 21 Sir J. A. Macdonald reported to the governor-general that the cabinet, 'having fully considered the despatch and his excellency's minute, desire to state that, after anxious consideration, they adhere to the advice previously tendered to him for the removal of Lieutenant-Governor Letellier.'

Upon which, by order in council, approved by the governor-general on July 25, it was resolved, 'that it is expedient and necessary that Mr. Letellier should be removed from his office of lieutenant-governor of Quebec ;' and that 'the cause to be assigned for such removal, according to the provisions of the fifty-ninth section of the British North America act, 1867, is, that after the vote of the

^h Com. Pap. 1878-79, v. 51, pp. 171, 172.

Letellier case. house of commons during last session, and that of the senate during the present session, Mr. Letellier's usefulness as a lieutenant-governor was gone.'

On the following day, on the recommendation of the prime minister, an order in council was passed, and approved by his excellency the governor-general, appointing the Hon. Thoodore Robitaille lieutenant-governor of the province of Quebec, in the room and stead of the Hon. Luc Letellier de St. Just, removed.¹

Its importance as a precedent.

The foregoing case is undoubtedly one of considerable importance as a precedent. It furnishes the first example of the interposition of dominion authority for the removal of a provincial lieutenant-governor from office before the expiration of his ordinary term of service. It requires, therefore, to be carefully and dispassionately examined, lest erroneous conclusions should be hereafter drawn, from the action taken upon this case by either party; and lest it should seem to justify dominion interference in provincial affairs under unwarrantable circumstances.

M. Letellier's erroneous position.

In the first place, it is indisputable that the lieutenant-governor of Quebec was in error when he claimed that, as the representative of the sovereign, he was 'irresponsible for acts performed within the legitimate sphere of the duties prescribed to him by the British North America act.'¹ If this were so, as Sir John A. Macdonald justly remarks, 'a provincial lieutenant-governor would be the only practically irresponsible official in Canada.'^k A lieutenant-governor is clearly responsible to the authority that has appointed him, and by which he is removable, although he is not responsible to any other tribunal for his conduct in office.

M. Joly's error.

Again, we cannot approve of M. Joly's assumption that the framers of the British North America act drew

¹ Com. Pap. 1878-79, v. 51, pp. 173-175.

^j *Ib.* p. 158.

^k *Ib.* p. 153.

an intentional distinction between the authority that appoints lieutenant-governors, and the authority that is competent to dismiss them—making the appointment to proceed from the governor-general in council, and the dismissal to be the act of the governor personally. The advocates of this theory contend that the distinction was advisedly made, for the purpose of securing to lieutenant-governors a position of permanence, during their five years' lease of office, irrespective of the changes of party government at Ottawa within that period.¹ But Sir John A. Macdonald easily refutes this argument, as well on practical grounds as upon constitutional principle. He points to the undeniable fact that all acts of government must equally be performed under the advice of responsible ministers wherever the British constitution prevails, whether the chief executive officer is individually charged with the same, or whether his council are formally associated with him in the transaction.^m

Letellier
case.

Refuted
by Sir J.
A. Mac-
donald.

It is evident that the tenure of office of a lieutenant-governor is 'during the pleasure of the governor-general,'ⁿ a phrase which is descriptive of a tenure different in kind from that of one who holds office 'during good behaviour.' It confers no vested right upon a lieutenant-governor to retain his office for any number of years, and it gives a wide scope for the exercise of discretion on the part of the removing power.

We may, therefore, pass by as unworthy of notice, the contention that the governor-general personally has alone the power of dismissing a lieutenant-governor; and that he is at liberty, in the exercise of this prerogative, to act independently of his constitutional advisers. Not only has the Canadian premier exposed the fallacy of this argument, but her Majesty's secretary of state

And by
the colo-
nial secre-
tary.

¹ Com. Pap. 1878-79, v. 51, p. 453.

162.

ⁿ B. N. A. Act, 1867, sec. 59.

^m *Ib.* p. 153. And see *ante*, p.

Letellier
case.

for the colonies has ratified Sir John A. Macdonald's interpretation of the Imperial statute in this particular.

There can, then, be no doubt that a lieutenant-governor is directly responsible to the authority by which he has been appointed, namely, the governor-general in council, and that he is removable 'at pleasure' by that body.

On the other hand, the position of a lieutenant-governor, under the British North America act, is one which renders great caution and forbearance necessary in the exercise of this authority.

Provincial
rights of
self-
govern-
ment,

The union of the provinces effected by that statute was a federal union. And it was so framed as to preserve intact and inviolate the local rights and privileges previously assured to the several provinces, so far as is compatible with their confederation.

One especial privilege conceded to the colonies in North America when 'responsible government' was established therein was that of self-government in local affairs. This privilege was obtained after a protracted political struggle, and was highly prized.

By the British North America act of 1867, the Crown transferred to the central dominion government and parliament the measure of control previously exercised by the mother country over the respective provinces; and since their confederation the Imperial government has declined to interfere directly in questions of local concern in the provinces.^o But this concession to the federal government of Imperial rights over the provinces simply places that government in the position towards the provincial governments heretofore occupied by the Crown. It does not increase or diminish the relative powers of either in respect to local affairs. This

^o See *ante*, pp. 426, 455, 458.

principle has been unreservedly established as regards provincial legislation. It is well understood that each province retains 'exclusive' rights of legislation within its assigned jurisdiction, that may not be interfered with by the dominion government, save only when dominion interests or the public welfare in general might be injuriously affected by such legislation.^p

Letellier case.

The same principle applies with equal force to acts of administration. The spirit and intent of the British North America act equally forbids unnecessary interference by the dominion executive with provincial rights in all matters of local self-government.

This explains why a restraint is imposed by that statute upon the prerogative right of dismissing a lieutenant-governor.

Constitutional restraints on dismissal of a lieutenant-governor.

Such functionaries cannot be removed 'at pleasure,' as freely as the sovereign is at liberty to remove a colonial governor. The act secures them against any such arbitrary exercise of the prerogative. They are only removable within five years of their appointment 'for cause assigned, which shall be communicated by message to the senate and house of commons' at the earliest possible period.

The object of this proviso is manifestly to guard against a removal for insufficient cause, and to afford a guarantee to the provinces that their chief executive officers shall not be removed for any reason that would impair or infringe upon the cherished right of local self-government.

But what, it may be asked, would be a sufficient cause for such a proceeding?

Undoubtedly, if a lieutenant-governor overstepped his lawful powers he would be properly subject to dismissal.

^p See *ante*, pp. 524-529.

Letellier
case.

Or if he exercised his lawful powers in an improper and partial manner.

But, let the sufficient cause be what it may, it is clear that the responsibility for the act of removal devolves upon the governor-general in council; and that the initiatory step to that end should proceed from thence.

Dominion
executive
should
initiate
such dis-
missal.

To permit the initiative in such a momentous proceeding to be undertaken by either house of parliament would be an undue interference with executive responsibility. It would weaken the just authority of the Crown, and produce a result for which no one could be held actually responsible.

Herein, it is obvious that the dominion government was at fault in the procedure against Governor Letellier.

They had abstained, as a government, from calling M. Letellier to account. And when the two houses of parliament had passed resolutions calling for his removal, the premier informed the governor-general that, in the opinion of ministers, 'it was not at all necessary, in order to justify their advice, to go behind the vote of parliament: . . . even if their opinion had been adverse to that arrived at by parliament, it seems clear that they are bound to respect that decision, and to act upon it, as they have done, by advising the removal.'^a

This statement involves a complete abnegation of ministerial responsibility, and a surrender of the safeguards over individual rights which ministerial responsibility is intended to afford.

We have elsewhere shown that 'any direct interference by resolution of parliament in the details of government is inconsistent with and subversive of the kingly authority, and is a departure from the fundamental principle of the British constitution, which vests all executive authority in the sovereign, while it insures

^a Com. Pap. 1878-79, v. 51, p. 152.

complete responsibility for the exercise of every act of sovereignty.' And that 'no resolution of either house of parliament which attempts to adjudicate in any case that is within the province of the government to determine has of itself any force or effect.'^r

Letellier
case.

Even where parliament has been invested by statute, with the direct right of initiating a criminatory proceeding for the removal of a high public functionary, as where a judge is declared to be removable upon an address from the two houses of the Imperial parliament, constitutional practice requires that, in any such address, 'the acts of misconduct which have occasioned the adoption thereof ought to be recapitulated, in order to enable the sovereign to exercise a constitutional discretion in acting upon the advice of parliament.'^s

Reserved
discre-
tionary
powers of
the
Crown.

This wholesome rule is imperatively insisted upon by the Crown in all addresses from colonial legislatures for the removal of judges appointed under a similar parliamentary tenure. In cases where it has been disregarded, the Crown has refused to give effect to the address, though passed by a colony enjoying 'responsible government.' And this because 'in dismissing a judge, in compliance with addresses from a local legislature and in conformity with law, the Queen is not performing a mere ministerial act, but adopting a grave responsibility, which her Majesty cannot be advised to incur without satisfactory evidence that the dismissal is proper.'^t

The resolutions passed by the senate and house of commons of Canada, in 1878 and 1879, substantially agree in declaring that the dismissal by the lieutenant-

^r Todd, *Parl. Govt.* v. 1, p. 257, new ed. v. 1, p. 420.

^t See *post*, p. 846. And see Sir F. Rogers' memorandum, in *Com. Pap.* 1870, v. 49, p. 440.

^s *Ib.* v. 2, p. 744, new ed. v. 2, p. 875.

Action of
dominion
govern-
ment in
Letellier
case con-
sidered.

governor of Quebec of his ministers, on March 2, 1878, was under the circumstances unwise, and subversive of the constitutional principles upon which responsible government should be conducted.

This assertion is, in itself, extremely vague and ambiguous. It does not explain why the dismissal was 'urwise,' or in what respect it was 'subversive of the position of ministers under responsible government.'

We are, therefore, compelled to conclude that the action taken for the removal of Lieutenant-Governor Letellier was at variance with constitutional law and precedent, as well as contrary to the spirit and intent of the British North America act; inasmuch as it was initiated by parliament and not by the executive government, and did not set forth the particular acts of misconduct for which his removal was deemed to be necessary.

If we go behind the formal resolutions of parliament, and inquire into the reasons urged by the advocates of these resolutions for their adoption, we find it alleged, as a primary motive to justify the dismissal of the lieutenant-governor, that, by his dismissal of his ministers at a time when they were able to command a majority in parliament, he had exercised an arbitrary and obsolete power, which was incompatible with the recognition of responsible government. The leader of the opposition in the commons, in advocating the adoption of the resolution against Governor Letellier, said that, 'in England, the power of dismissal of a government having the confidence of parliament is gone for ever, and that, if it is gone there, it ought never to have been attempted to be introduced in a colony under the British Crown.'^u

^u Canadian Hansard, April 11, 1878, p. 1894.

It is scarcely necessary to point out, to any attentive reader of this treatise, that this ill-considered declaration has no warrant, either in theory or practice. In our preliminary chapter, we have described the precise powers of the sovereign in relation to her ministers and parliament, as the same have been defined by eminent British statesmen of our own day. The reserved powers of the Crown, which like all prerogatives are held in trust for the benefit of the people, are therein clearly shown to include the right of appealing, at all times, from a ministry, strong (it may be) in the possession of the confidence of the existing parliament, to the electorate, whose decision must ultimately prevail. Meanwhile, the Crown is constitutionally competent to dismiss any ministry in whom the sovereign is no longer able to confide, and invite the assistance of other ministers who are willing to be responsible for this act of the Crown.^v To deny to the sovereign the possession of these reserved powers—however seldom it may be needful to exercise them—would be, in effect, to destroy the strength and vitality of the monarchy.

Letellier
case.

And this is equally true of the powers of a governor in the colonies of Great Britain.

Constitutional
powers
of a
governor.

The right of a governor, or lieutenant-governor, to dismiss his ministers, when he has ceased to have confidence in them is undeniable; and that right is not impaired by the fact of their being able to command a majority in the representative chamber. This principle has been repeatedly affirmed in colonies under responsible government,^w and it is now placed beyond the reach of cavil by the corroborative testimony of her Majesty's secretary of state for the colonies in the Letellier case, that 'there can be no doubt that [the lieutenant-governor of a province] has an unquestionable

^v See *ante*, pp. 13, 20.

^w See *post*, p. 628.

Letellier
case.

constitutional right to dismiss his ministers, if, from any cause, he feels it incumbent upon him to do so.' ^x

This abstract right being admitted, we may go further and declare that it is the bounden duty of a governor to dismiss his ministers, if he believes their policy to be injurious to the public interests, or their conduct to be such, in their official capacity, that he can no longer act with them harmoniously for the public good. But before a governor proceeds to this extremity, at least towards a ministry having the confidence of the assembly, he should be assured that he can replace them by others, who will be acceptable to the country and to the assembly, as well as to himself, and who will be prepared to assume full responsibility for his act in effecting the change of government.

By a dissolution of the assembly, consequent upon a change of ministry, this question is brought directly under the review of the constituencies.

In the Letellier case, the province of Quebec—which was the only part of the dominion directly interested in the wisdom of the lieutenant-governor's act in the dismissal of his ministers—ratified the same by the support which they afforded to M. Joly, the minister who became constitutionally responsible for the action of the lieutenant-governor.

Conduct
of a lieu-
tenant-
governor
not a
party
question.

To revert for a moment to the votes of censure against Governor Letellier, which we have characterised as 'vague and ambiguous.' It is noticeable that these votes, whenever they were proposed, and whether they were negatived or affirmed, were invariably decided as strict party questions. This fact leads us to object, still further, to the proceedings in this case, and to deprecate any reliance upon it, as a precedent for future guidance.

^x See *ante*, p. 606. And see Hans. D. v. 191, pp. 1994 (Marquess of Salisbury), 1996 (Earl Grey).

Such questions should always be determined upon broad grounds of justice and of public policy, wholly irrespective of party proclivities. While it may be unnecessary that a governor should be pointedly charged with gross moral or political misdeeds, and while the removal of a governor may undoubtedly be advisable on less personal considerations, yet there should be at least the security against political oppression which is afforded by insisting that a vote in condemnation ought not to be affirmed or rejected upon strict party lines.

Letellier
case.

It may be said, however, that the unanimous defence of M. Letellier by his own political friends was in itself a presumption that he had been unduly influenced by party bias in his official conduct, instead of uniformly exhibiting the neutrality which is essential to the position of a constitutional governor. And Sir John A. Macdonald, in his memorandum on the case, presented to the governor-general after the last adverse vote in the house of commons against Governor Letellier, says that his removal would be 'a warning to all future lieutenant-governors to exercise their powers as such with the strictest impartiality. As M. Letellier has been the first, in the case of his removal, he will probably be the last partisan lieutenant-governor, and all future trouble from that source may be considered as at an end.'^y

If this had been M. Letellier's offence, why was not the charge of partiality and political preferences distinctly formulated against him, and his sentence of dismissal based upon proof of the same? Such proof, if it existed, could not have been difficult to procure, and for the credit of the country, as well as in view of the importance of establishing a great constitutional precedent upon an adequate and unimpeachable founda-

Alleged
miscon-
duct
should be
stated and
proved.

^y Com. Pap. 1878-79, v. 51, p. 154.

Letellier
case.

tion, it should have been adduced on this occasion, and the order in council for M. Letellier's removal predicated upon it.

Instead of this, the order in council, equally with the resolutions upon which it was professedly founded, was vague and indeterminate. In effect it was a mere assertion that, in the opinion of the political allies of the dismissed ministers and of the political opponents of those who had been placed in power by the act of the lieutenant-governor, 'his usefulness was gone!'

It is true that a vote of want of confidence in an existing administration may properly be passed in either house of parliament, without it being necessary to assign any reasons for the same.² But votes of this description are essentially political, and are always carried by party majorities. They express the general feelings of those who support them, whilst the particular reasons which influence the majority of members may materially differ.

But it is contrary to the first principles of justice, and in opposition to the established usage of parliament, to entertain criminative complaints against individuals except for cause assigned, which cause should be the assured warrant of its own sufficiency, upon proof of the complaint being substantiated.^a

Apart from all personal considerations, and aside from the question whether M. Letellier's conduct was uniformly discreet and unobjectionable, there is another aspect in which this case must be examined.

Dominion
action in
Letellier
case an in-
terference
with local
rights.

Bearing in mind the importance in our confederate system of preserving intact provincial rights, and the obvious peril of any undue or arbitrary interference therewith by the federal government, we must inquire,

² See Todd, *Parl. Govt.* v. 2, p. 396, new ed. v. 2, p. 494.

^a *Ib.* v. 1, p. 354, new ed. v. 1, p. 573.

whether the action of the lieutenant-governor in dismissing his ministers was so manifestly unwise and unnecessary as to justify the interposition of dominion authority for its condemnation.

Letellier
case.

It is notorious that, if the forms of the house had permitted, the majority of the house of commons who negatived the motion of censure against Governor Letellier on April 11, 1878, would have directly asserted, in bar of this proposition, the undeniable principle of non-intervention by the federal government in a matter of provincial concern.^b But the motion was offered as an amendment upon going into committee of supply, when by parliamentary usage no further amendment is allowable; otherwise, had it been possible to raise a distinct issue upon this principle, it would have been difficult and injudicious for any Canadian statesman to have committed himself to an open repudiation of it.

In the senate, however, no such hindrance existed. The minority in that chamber were of the party of the majority in the commons. They, therefore, failed to prevent the passing of the resolution censuring the lieutenant-governor. But they placed on record their reasons for objecting to the vote by an amendment which declared that, under the rule of our constitution, the federal and the provincial governments, each in their own sphere, enjoy responsible government equally, separately, and independently; therefore, under existing circumstances, this house deems it inexpedient to offer any opinion on the recent action of the lieutenant-governor of the province of Quebec or of his late ministers.^c

This view of the case was consistent and statesman-like. It did not ignore the propriety of a dominion

^b M. Joly's letter to the colonial secretary of May 22, 1879, Com. Pap. 1878-79, v. 51, p. 166.

^c See *ante*, p. 603.

Letellier
case.

secretary of state addressing words of caution and advice to a lieutenant-governor, whenever it might appear suitable and expedient. But it deprecated coercive interference in any matter plainly and exclusively within the domain of provincial rights.

If any just cause of offence or complaint had arisen out of the conduct of Lieutenant-Governor Letellier towards his late ministers, the legislative assembly of the province were competent to afford redress. The Joly administration, which succeeded to office, thereby assumed entire responsibility for the act of the lieutenant-governor in dismissing their predecessors. If only that ministry had been compelled to resign—either by the vote of the assembly or as the result of an appeal to the people—the governor must have recalled his late advisers. But, by the dissolution of the legislature which ensued, the electoral body of the province ratified the action of M. Letellier, and upheld him in the exercise of his lawful prerogative.

Lieutenant-governors accountable to dominion government.

We are free to admit that the responsibility which, under the British North America act, a lieutenant-governor incurs to the governor-general in council renders him amenable to the dominion government for his conduct in office; and that, upon all needful occasions, that government may interpose, either to correct irregularities, to counsel in emergencies, or, if necessary, to remove an incompetent or untrustworthy governor, before the expiration of his ordinary term of service.

But, in the discharge of this duty, in a system so complex and delicate as that of the Canadian confederation, great caution and forbearance must be observed, so as to avoid the suspicion of party influences, or of a disposition to encroach upon provincial rights of self-government.

An officer of the eminent position and responsibility

of a lieutenant-governor should be placed beyond the reach of party strife. His own reputation as a public man will always depend upon his unswerving impartiality and entire freedom from party bias. But he ought not to be exposed to political assaults for his official conduct. And it should not be in the power of a defeated minority in his own province to assail a lieutenant-governor or his responsible advisers by appealing against them, on party grounds, to a sympathising majority in the dominion parliament.

Lieut.-
governor
above
party
influence.

Every individual in the community is interested in sustaining the office of lieutenant-governor, and in securing for its occupant an independent and non-political tenure. It is, therefore, clear that the 'cause assigned' for the removal of a lieutenant-governor should be wholly irrespective of party considerations or of political predilections, and should be sufficiently weighty and unequivocal to command the suffrages of all parties, in the event of an expression of the opinion of the dominion parliament being invited upon such an act.

Not to
be re-
moved on
party
grounds.

The law which prescribes that notification of the order in council for the removal from office of a lieutenant-governor, and of the cause thereof, shall be communicated, with as little delay as possible, to the senate and house of commons of the dominion undoubtedly empowers either house to express its opinion or to tender advice to the governor-general, not merely in reference to such removal, but also upon any question that may appropriately arise out of the appointment of a lieutenant-governor, or in regard to his execution of his trust.

But, when we note the jealous care which is apparent throughout the British North America act to define and regulate the exercise of the 'exclusive powers' assigned by that statute to the provincial

Nights
secured to
the pro-
vinces by
the
B. N. A.
act.

governments—whether those powers appertain to the executive or to the legislature—it is manifest that it was the intention of the Imperial parliament to guard from invasion all rights and powers exclusively conferred upon the provincial authorities, and to provide that the reserved right of interference therewith by the dominion executive or parliament should not be exercised in the interests of any political party, or so as to impair the principle of local self-government. Prior to confederation, this principle was earnestly and successfully contended for, as a restraint upon undue interference by the Imperial authorities in matters of local concern. It is no less essential now, when the diverse interests of separate provinces, heretofore independent of each other, require to be harmoniously combined—without infringing upon the freedom of any government within the sphere of its constitutional powers—so as to insure unity and co-operation for the common good.

Hence, we conclude that the reserved right of the dominion government to remove a provincial lieutenant-governor from office should only be used upon grave emergencies—so obviously irrespective of party considerations as to secure the consent of all impartial statesmen—and moreover when it is clear that the removal can be effected without detriment to the principle of local self-government.

Action by
dominion
parlia-
ment on
provincial
questions.

The abstract right of deliberation, and of consequent action thereupon, which is undeniably possessed by the two houses of the dominion parliament, upon all matters which affect or concern the welfare of the Canadian people, is likewise subject to limitation and restraint, by the constitutional law of the confederation. And it is equally incumbent upon the dominion parliament, as it is upon the governor-general in council and upon the governor-general in his capacity of an

Imperial officer, representing in Canada the authority of the Crown, to respect and uphold the federal rights secured to the several provinces by the British North America act; and to abstain from encroaching upon the same, and from any undue interference therewith.^d

Free discussion in the parliament of the dominion, upon all Canadian questions, is a constitutional and indisputable privilege, the exercise of which may be oftentimes productive of a good understanding between conflicting parties, even in regard to questions which are undeniably of provincial concern. But the houses of parliament ought to refrain from any overt acts, and even from the formal enunciation of any opinion, in respect to matters which do not come within the sphere of their jurisdiction as a federal legislature. It is to their cautious and timely forbearance, in deliberation and action, that the Imperial houses of lords and commons are mainly indebted for the weight and influence which are justly attributed to their debates, upon questions which do not immediately affect British interests, and where their principal aim is to guide and enlighten public opinion in other countries, without assuming a right to dictate, or to interfere with the absolute freedom of independent powers.^e

Lord Carnarvon, in his speech at the Montreal banquet, on September 19, 1883, said:—‘The British North America act is not to be construed merely as a municipal act, but should be viewed as a treaty of alliance, requiring sobriety of judgment and plain common sense to interpret it. Work out the great questions before you on the old lines of a God-fearing

Cautious deliberation when dealing with provincial questions.

^d See Earl of Dufferin's despatch to the colonial secretary, of Aug. 15, 1873, p. 16. (Canada Com. Jour. v. 7, p. 27.) Earl of Carnarvon, Hans. D. v. 185, p. 563. New Brunswick School case, *ante*, p. 458.

^e See Todd, Parl. Govt. in Eng. v. 1, p. 619, new ed. v. 1, p. 379.

Lord Carnarvon's
speech on
B. N. A.
act.

and law-abiding people. Administer your great trust in an Imperial spirit.

‘In legislation, in self-government, you are free, and may you ever remain so, but in loyalty to the Crown, in love to the mother country, may you ever be bound in chains of adamant.’

CHAPTER XVII.

PART I.

LOCAL SELF-GOVERNMENT IN THE COLONIES.

Colonial rights of self-government in local affairs, and the position of a governor in relation thereto.

‘RESPONSIBLE government’ was avowedly introduced into the colonies of Great Britain for the purpose of reproducing in them a system of local self-government, akin to that which prevails in the mother country, and to relieve the colonies from Imperial interference in their domestic or internal concerns.

Introduc-
tion of re-
sponsible
govern-
ment.

To effect this desirable result, no material alteration was necessary in the structure of colonial institutions. The needful change was accomplished, as we have seen, by instructions from the Crown to the several colonial governments, directing that, for the future, public affairs in the colony should be administered in conformity with the principles of ministerial responsibility which, since the Revolution of 1688, have been engrafted upon the British Constitution.^a

The advocates of colonial reform had long striven to obtain such a modification in the methods of colonial administration as would confer upon British subjects in the colonies similar rights of self-government to those enjoyed by their fellow-citizens at home. This boon it was the expressed desire of the Imperial government

^a See *ante*, p. 28; and Merivale on the Colonies, ed. 1861, p. 636.

Respon-
sible go-
vernment.

to bestow, so far, at least, as was compatible with the allegiance due to the Crown.

The new polity granted to the colonies was not intended, however, to effect a fundamental change in the principles of government, by substituting democratic for monarchical rule. It was designed to extend to distant parts of the empire the practical benefits of a parliamentary system similar to that which exists in the parent state, and thus to render political institutions in the colonies, as far as possible, 'the very image and transcript' of those of Great Britain.

The British government is a limited monarchy, wherein the sovereign has certain constitutional rights and a defined position.

Position
of go-
vernor
under re-
sponsible
govern-
ment.

In the substantial reproduction in a British colony of the Imperial polity, the governor must be regarded not merely as the representative of the Crown in matters of Imperial obligation, but as the embodiment of the monarchical element in the colonial system, and the source of all executive authority therein.^b

Our colonial institutions, derived from and identical in principle with those of the mother country, are essentially monarchical, and whatsoever duties or rights appertain to the Crown in the one are equally appropriate and obligatory in the other. In the constitutional monarchy of Great Britain, there is no opportunity or justification for the exercise of personal government by prerogative. The Crown must always act through advisers, approved of parliament, and their policy must always be in harmony with the sentiments of the majority in the popular chamber. With this important limitation, however, the British monarch occupies a position of authority and influence,

^b See Chalmers' Opinions, Am. in Canada, p. 42; and see *ante*, p. ed. p. 240; O'Sullivan, Government 30.

and is a weighty factor in the direction of public affairs; exercising his high trust for the welfare of the people, and as the guardian of their political liberties.

The Crown
repre-
sented.

These elementary maxims of the British Constitution have been fully set forth in the earlier pages of this treatise, and the precise relation of the sovereign, in the mother country, to her ministers and to parliament, have been therein carefully explained.

In applying these general principles of Imperial administration to our colonial system, a constitutional governor should (as expressed by Earl Grey) make 'a judicious use of the influence rather than of the authority of his office.'^c Moreover, it is undoubtedly true that a governor, in colonies possessing parliamentary institutions, following the example of the sovereign, whose representative and minister he is, in his prescribed sphere and jurisdiction, should, as a general rule, refrain from personal interference with his ministers in their direction of local affairs. This is in accordance with the well-known axiom of colonial responsible government, first enunciated by Lord John Russell when secretary of state for the colonies, that 'in all matters of domestic policy, the colony should be governed according to the well-understood views and wishes of its inhabitants, as expressed through their representatives in the legislature;' and it is in conformity with the royal instructions for the guidance of governors in colonies under responsible government, which state that, under such circumstances, 'the control of all public departments is practically placed in the hands of persons commanding the confidence of a representative legislature.'^d

Non-inter-
ference of
governor
in local
affairs.

^c See Governor Bowen's despatch to the Earl of Carnarvon, of Sept. 19, 1877; Com. Pap. 1878, v. 56, p. 715.

^d See Com. Pap. 1866, v. 50, p. 740; and the Colonial Regulations, 1892, sec. 4.

The
governor.

This rule of non-interference, on the part of a constitutional governor, in matters of local concern, is subject, however, to certain limitations, which are identical in principle with the usages which define and regulate the duties of the sovereign at home.

Except to
uphold
the law, or
protect
the
people.

Firstly, the governor is the especial guardian of the law, and must never sanction any ministerial act or proposal which infringes upon an existing law.

Secondly, the governor, like the Queen herself, is morally bound to be satisfied as to the wisdom and political expediency of every act or proceeding advised by his ministers, before he ratifies and sanctions the same with the authority which appertains to his office.

Must con-
sent to all
acts of go-
vernment.

To enable the governor to form sound and intelligent conclusions in regard to every question of state policy, or act of administration submitted to him for his approval, it is essential that the fullest information should be communicated to him in relation to the same; that he should be free to criticise, discuss, and suggest alterations thereupon; and likewise that he should himself be at liberty to propose, for the consideration and concurrence of his ministers, any matter or thing which he might deem to be proper for governmental action.

His re-
served
powers.

While it should be the continual aim of a constitutional governor to co-operate cordially with his ministers for the time being, irrespective of personal inclinations or of party preferences, should he be unable to agree with them upon any matter affecting the public interests which he may consider to be of sufficiently vital consequence to justify such an extreme measure, he is always entitled, as a last resort, to dismiss them from his counsels, and to have recourse to other advisers. By the exercise of this reserved power, upon suitable occasions, the full benefits of monarchical government are guaranteed to the people. And the necessity imposed upon the governor under such circumstances that he

should be able to secure the assistance of other ministers, who are willing to become responsible for his acts in the dismissal of their predecessors; together with the obligation imposed upon the new administration of obtaining a ratification of their conduct and policy by the local parliament, either with or without a direct appeal to the constituencies by a dissolution of the same,—affords an ample warrant that these constitutional powers will be wisely used, and solely for the public good.^e

If circumstances compel a governor to accept a policy, or to give effect to recommendations of his ministers, in which his judgment does not wholly coincide, it becomes his duty to report the facts and his own opinions to the secretary of state. The Imperial government may deem it expedient to refrain from interference in a matter of local concern, such questions having been relegated to the discretion of colonial governments: they would, nevertheless, be free to suggest the propriety of further inquiry; and should, at any rate, be satisfied as to the conduct of the governor in the matter, he being an Imperial functionary responsible to the Crown.^f

This doctrine may be illustrated by reference to the following extracts from despatches from her Majesty's secretary of state for the colonies to colonial governors:—

Thus, on March 26, 1862, the colonial secretary (the Duke of Newcastle) wrote as follows to the governor of Queensland (Sir G. F. Bowen):—

^e See *ante*, pp. 52, 448, 615, and *post*, pp. 642, 657, 661. And see Nineteenth Cent. v. 4, p. 1063.

^f Governor Sir A. H. Gordon's despatch of Feb. 26, of July 16, and of Dec. 3, 1881, and subsequent dates, to the Earl of Kimberley, in regard to the policy in New Zealand respecting land disputes with

the Maoris, in alleged violation of the Treaty of Waitangi; and Lord Kimberley's despatch of August 8, 1882, on the same subject. Com. Pap. 1882, v. 46, pp. 372, 389, 523, 530, 545; Hans. D. v. 270, p. 1585; New Zeal. Parl. Pap. 1882, App. A. 8; and see *ante*, p. 201.

The
governor

should
report to
Imperial
authori-
ties.

Limits of
governor's
interfe-
rence in
local con-
cerns.

'The general principle by which the governor of a colony possessing responsible government is to be guided is this: that, when Imperial interests are concerned, he is to consider himself the guardian of those interests; but, in matters of purely local politics, he is bound, except in extreme cases, to follow the advice of a ministry which appears to possess the confidence of the legislature. But extreme cases are those which cannot be reduced to any recognised principle, arising in circumstances which it is impossible or unwise to anticipate, and of which the full force can, in general, be estimated only by persons in immediate contact with them.'

The Duke of Newcastle, however, defined the 'extreme cases' referred to by him as 'such extreme and exceptional circumstances as would warrant a military or naval officer in taking some critical step against or beyond his orders. Like such an officer, the governor, who took so unusual a course in the absence of instructions from home, would not be necessarily wrong, but he would necessarily act at his own peril. If the question were one in which Imperial interests were concerned, it would be for the home government to consider whether his exceptional measure had been right and prudent. If the question were one in which colonial interests were alone or principally concerned, he would also make himself, in a certain sense, responsible to the colonists, who might justify the course he had taken, and even prove their gratitude to him for taking it by supporting him against the ministers whose advice he had rejected; but who, on the other hand, if they perseveringly supported those ministers, might ultimately succeed in making it impossible for him to carry on the government, and thus, perhaps, necessitate his recall.'

The Duke of Newcastle added these significant remarks:—'In granting responsible government to the larger colonies of Great Britain, the Imperial government were fully aware that the power they granted must occasionally be used amiss. But they have always trusted that the errors of a free government would cure themselves; and that the colonists would be led to exert greater energy and circumspection in legislation and government when they were made to feel that they would not be rescued from the consequences of any imprudence merely affecting themselves by authoritative intervention of the Crown or of the governor.'^s

On November 20, 1866, Lord Carnarvon, the then colonial secretary, addressed a despatch to Sir G. F.

^s Quoted in Sir G. F. Bowen's 56, p. 894. And see Victoria Parl. despatch to the secretary of state, of Pap. 1878, No. 27, p. 7. May 8, 1878; Com. Pap. 1878, v.

Bowen (governor of Queensland), which not merely endorses the general principle embodied in the preceding extract, but also refers to an important point of constitutional practice, arising out of the relations of a governor to his responsible ministers :—

The governor.

I have given my best consideration to the question which you have asked, whether it is requisite or desirable, in colonies possessing parliamentary government, that the consent of the governor (as of the sovereign in England) should be *previously* obtained by his ministers to their most important measures, especially to the introduction by them of any bills of an extraordinary nature, whereby the prerogative of the Crown, or the rights and property of British subjects resident elsewhere, or the trade of the United Kingdom, or other Imperial interests, may be prejudiced.

His previous consent to proposed legislation.

There can be no doubt that it is most desirable that the ministers should obtain the governor's previous concurrence in their most important measures, especially when they are of the character indicated in your present despatch.

It is obvious that without a full knowledge on the part of the governor of the measures which his responsible ministers intend to propose to the representative assembly of the colony, and an assent on his part to their introduction, so far as he can properly give such assent, there cannot exist that frank and confidential relationship between the governor and his advisers which must be always conducive to the harmonious working of government.

I am, however, unable to say that it is indispensable that this concurrence should be obtained, or that governors are bound to enforce the practice.

I am advised that there is no law or rule which renders indispensable such a practice in England, except when a measure is in progress affecting the rights of the Crown ; and in this case the rule applies to private members as much as to the government of the day. With this qualification, no exception would be taken in parliament to a measure proposed by a minister of the Crown on the ground that it is alleged or even admitted not to have received the previous assent of the Crown. Whether it has or not been submitted to the sovereign, is a matter between the sovereign and the minister. In practice, no doubt, the sovereign, if he disapproved of a measure introduced by his ministers, would have the constitutional right to dismiss them ; but whether he would choose to exercise this right would depend upon other constitutional considerations bearing on the expediency of a change of ministers.

This being the relation of your executive council towards yourself, as representing the sovereign authority of the Queen, I think that you are at liberty, or rather that you would be bound in fairness, to inform them of the course you proposed to take respecting any particular measure proposed by them, whether by giving it, when passed, the assent of the Crown, by refusing that assent, or by reserving it for the signification of her Majesty's pleasure.^h

Governor's
duty to
uphold
the law.

But while 'it is the desire of her Majesty's government to observe to the utmost the principle which establishes ministerial responsibility in the administration of colonial affairs, . . . nevertheless, it is always the plain and paramount duty of the Queen's representative to obey the law, and to take care that the authority of the Crown, derived to his ministers through him, is exercised only in conformity with the law.'ⁱ

An instance of the strictness with which this principle is maintained by the Imperial government, and of the serious consequences attending upon any deviation therefrom on the part of a colonial governor, is afforded in the case of Sir Charles Darling, who was recalled from his post as governor of Victoria, in 1866, because of his departure from the rule of conduct prescribed by the Queen's government, of a rigid adherence to law in all affairs of state.^j

Another remarkable and instructive exemplification of the same principle occurred in New South Wales, under the following circumstances:—

^h Queensland Leg. Assem. Votes, 1867, p. 84. We have already considered the circumstances under which a governor would be justified in refusing his assent to bills proposed to be submitted by his ministers to the local legislature; see *ante*, p. 166, *et seq.*

ⁱ Mr. Secretary Cardwell to Governor Sir C. Darling, January 26,

1866; Com. Pap. 1866, v. 50, p. 697.

^j Particulars of this case have been already given; see *ante*, pp. 136–141. See also the reprimand administered to Governor Bowen, in 1878, for failing to uphold the supremacy of the law at all hazards, *post*, pp. 737, 739.

Responsible government was introduced into New South Wales in 1855. Three years afterwards, the frequent delays which attended the passing of the estimates gave rise to an irregular practice of permitting public expenditure to be incurred under the authority of the governor in council, pursuant to votes of credit and resolutions of the assembly, in anticipation of the passing of appropriation acts by the local parliament. This practice continued to be observed until the appointment of the Earl of Belmore to be governor, in 1867.

Governor's duty to prevent unauthorised expenditure.

No sooner had Lord Belmore assumed the reins of government than he immediately turned his attention to this matter. He perceived the grave objections to the continuance of a practice so unlawful, and was keenly alive to the personal responsibility which he himself incurred by issuing his warrant to authorise expenditure which had not been sanctioned by both branches of the legislature.

He accordingly wrote to the colonial secretary (the Duke of Buckingham) for instructions, as to whether he was legally and constitutionally competent to exercise a discretionary power, under such circumstances, as had been done by his predecessors in office since 1858.

In reply, he was informed that a governor could not legally authorise the expenditure of public money, without an appropriation act; and that he was bound to refuse to sign a warrant sanctioning any such expenditure which had not been authorised by law. But that, as in England so in New South Wales, occasions of supreme emergency might arise, which would justify a departure from ordinary rules, and wherein, upon the advice and responsibility of his ministers, and after a careful consideration of the particular circumstances, the governor might exercise such an authority.

Every case of this kind must be determined on its own merits; but, as a rule, the secretary of state was of opinion that such irregular expenditure could only be justified, 'first, on the ground of necessity; or, secondly, on the ground that it is sure to be subsequently sanctioned—joined to strong grounds of expediency, even though short of actual necessity.'^k

A few months afterwards, Lord Belmore again addressed the colonial secretary on this subject, alleging that the legislative council of the colony had taken umbrage at certain unauthorised expenditure which had been avowedly incurred by government, without an act of appropriation; and that the council had protested

^k Secretary of State's despatch 1868; in Com. Pap. 1878, v. 56, p. to Governor Belmore, of Sept. 30, 1868.

Governor's obligations to adhere to the law.

against the proceeding, as being 'derogatory to the privileges of parliament, and subversive of the constitution.'

The governor explained that, in this instance, the payment had been merely of certain official salaries, in anticipation of the appropriation act, the passing of which had been inadvertently delayed by a parliamentary adjournment; and that there had been no intentional infringement of the privileges of the legislative council.

The colonial secretary (Earl Granville), in a despatch dated June 16, 1869, pointed out that any such proceeding was at variance with the instructions contained in the foregoing despatch from the Duke of Buckingham; and observed that a temporary inconvenience to certain civil servants could not be regarded as 'an unforeseen emergency,' or as a case of expediency that would justify a violation of law. He added that, 'except in case of absolute and immediate necessity (such, for example, as the preservation of life), no expenditure of public money should be incurred, without sanction of law; unless it may be presumed not only that both branches of the legislature will hold the expenditure itself unobjectionable, but also that they will approve of that expenditure being made in anticipation of their consent.'¹

Upon the governor communicating this despatch to his ministers, they sent him in reply a minute, which, while explaining the practice heretofore pursued in such cases, was in effect a protest against the instructions issued by her Majesty's secretary of state to the governor, as being an interference, in a matter of local concern, with their responsibility as ministers of the Crown and representatives of the parliament and people of New South Wales, upon a question having no relation to Imperial interests.

His excellency forwarded this minute to the colonial secretary, who, in a despatch dated January 7, 1870, commented upon it. Admitting unreservedly that the matter in hand was a purely local question, her Majesty's government were nevertheless anxious that the governor's conduct should be in conformity with the public will, 'when constitutionally ascertained.' That will was authoritatively expressed 'through two channels—the legislature and the executive government.' The governor was justified in accepting, as the interpreter of the public will, a ministry presumed to possess the confidence of the legislature. But, if the law required him to do one thing, and his ministers recommended him another course, it was his plain duty to obey the law; and it would be idle to

¹ Com. Pap. 1878, v. 56, p. 943.

object that such obedience was unconstitutional ; for the governor is himself a branch of the legislature.

In a case of emergency, it might become necessary to overstep the law ; but some one must decide whether, in fact, such a contingency had arisen. The ministry claim that they should determine this question. 'But, so long as the letter of the law imposes on "the governor" the responsibility of preventing a breach of the law, this duty must be fulfilled by him. The personal responsibility of the governor in no way absolves him from attaching great weight to the opinions of his ministers, in respect to fact, law, or expediency.' But 'he remains, in the last resort, the judge of his own duty, and is not at liberty, on the advice of his ministers, . . . to commit an act contrary not only to the letter but to the spirit of the law.'

Obligations of law in all local matters.

The secretary of state was therefore unable to recall the instructions already given on this subject. The governor was bound to obey the law, even if adherence to his instructions should bring him into collision with his ministers. A difference with them would render it necessary to ascertain the wishes of the colony. The colony would probably pronounce in favour of retaining the personal sanction of the governor (in addition to that of the ministry) as a useful obstacle against unauthorised expenditure.

But if both branches of the legislature should agree to dispense with this injunction of the law, and desire that the governor should hereafter be guided by the advice of his ministers in the performance of this duty, her Majesty's government would not object to this conclusion, and would then free the governor from personal responsibility in the matter.

Lord Belmore, in a despatch dated May 10, 1870, informed the colonial secretary that he had caused the foregoing despatch to be communicated to the local parliament, and that a bill had been passed, which, though it did not relieve the governor of personal responsibility in regard to public expenditure, would establish a better system for the receipt, custody, and issue of the public moneys, and provide for the audit of the public accounts. His excellency added that he had notified his ministers that it would be incumbent upon him to obey the instructions of the secretary of state 'at all risks.' He had also suggested certain changes in the present mode of issuing public money, which it would be desirable, in the public interest, to adopt. And he had plainly stated his conviction that it was the duty of the people of the colony, not only to support the governor in the onerous responsibility which devolved upon him of controlling unauthorised expenditure, but that they should facilitate his performance of the same. It is gratifying

to know that the discussion of this difficult question did not impair the cordiality which should always subsist between the governor and his responsible advisers.^m

Co-operation
between
governor
and minis-
ters.

But, while a constitutional governor is bound to insist upon a strict conformity to law on the part of his responsible advisers in every act of administration, he is equally bound on his own behalf to afford to his ministers for the time being a cordial support and co-operation. This support should be entirely irrespective of party predilections. A governor, like the sovereign whom he represents, is removed out of the political arena, and placed above and beyond its strifes and temptations. His first duty is to be impartial and just to all, and, while he refrains from any act which could possibly be regarded as indicative of personal preference to either political party, he is in a position to exert a moderating and conciliatory influence with both parties. This will enable him at all times to bring an even and unbiassed judgment to bear upon whatever may need to be submitted for his consideration and approval.ⁿ

Routine
business.

Mere matters of ordinary routine in the administration of public business, which under the old colonial polity were settled by the governor, or at any rate submitted for his sanction, are, under responsible government, disposed of at once by the minister in charge of the department immediately concerned therein. But all documents which require the individual action of the governor—such as warrants upon the treasury, deeds for signature, applications for remissions of punishment and the like—should be sub-

^m Com. Pap. 1878, v. 56, pp. 943-956.

ⁿ See despatch to Governor Bowen, of Victoria, from the colonial secretary (Earl Carnarvon) of Nov. 16, 1876, and others to the

same effect, quoted in Governor Bowen's despatch, of Sept. 19, 1877, and Secretary Sir M. Hicks-Beach's despatch, of Feb. 28, 1878, approving of the same; in Com. Pap. 1878, v. 56, p. 717.

mitted to him in proper course through a minister of the Crown.^o

Governor
not to
assume
financial
control.

In colonies under responsible government, the governor ought not to assume responsibility for financial arrangements regarding expenditure which has been authorised by parliament, so long as they do not contravene existing law: such matters of detail are distinctly within the province of ministers responsible to parliament.^p Moreover, a constitutional governor 'takes no part in the settlement of the estimates, which are prepared by the responsible ministers at the head of the several departments of the public service.' His signature to a message to enable the assembly constitutionally to take into their consideration any proposed vote of public money is, therefore, under ordinary circumstances, 'a formal act,' which does not necessarily express or imply a personal opinion with regard to the policy of the proceeding which, upon the advice of his ministers, he has thus initiated and authorised.^q But the omission of the governor's recommendation to a measure appropriating public revenue is contrary to law, and invalidates all proceedings thereon.^r

Formal
acts by a
governor.

Bearing in mind this rule, Governor Bowen, of Victoria, on September 19, 1877, telegraphed her Majesty's secretary of state for the colonies to know whether he was at liberty to consent to his ministers placing on the estimates a vote for the payment of members of the local legislature, the principle of which had been twice affirmed by both houses, notwithstanding that, subsequently, separate bills to authorise the payment of members had been rejected by the legislative council.

In reply, the colonial secretary stated that, as the matter was one of purely local concern and involved no question calling for the

^o New South Wales Leg. Assem. Jour. 1859-60, v. 1. p. 1131.

^p See *post*, p. 719.

^q See this point fully discussed in Governor Bowen's despatch of Sept. 19, 1877; Com. Pap. 1878, v.

56, p. 717.

^r South Australia Leg. Coun. Minutes, 1882, pp. 152, 175. This defect of form was afterwards supplied, and new bills introduced, *ib.* pp. 159, 179.

intervention of the Imperial government, responsibility must rest entirely with ministers, and he saw no reason why the governor should hesitate to follow their advice.^s

Disputes
in Vic-
toria in
1867.

It is true that, in 1867, under somewhat similar circumstances, the then governor of Victoria had been instructed by the colonial secretary, in a despatch dated January 1, 1868, to refuse his sanction to placing on the estimates a grant in favour of the wife of ex-Governor Darling. But this objection was based on grounds of Imperial policy, which forbade any gift to be received by a colonial governor, or any of his family, from the colony over which he had presided, either during his term of office or upon his retirement.

But as we have already seen in our narrative of the case,^t this interposition of the Imperial authorities in a matter which, on general principles, ought (at least in this stage of the proceeding) to have been locally decided, gave great umbrage in the colony, and led to a ministerial crisis. Ministers resigned with a protest against the alleged unconstitutional interference of the secretary of state, in disregard of the rights of self-government which had been conceded to Victoria. The assembly sided with the ex-ministers. After a fruitless attempt to form a new administration, the governor was obliged to recall his late advisers to office. Fortunately at this juncture, the ex-governor himself, for personal reasons, declined the proposed grant, and so further trouble was averted.

But before this happy termination of the controversy, the colonial secretary modified his objection, and wrote a further despatch, intimating his opinion that, upon a review of the case, the proposal of the Victorian ministry did not appear 'to call for the extreme measure of

^s Com. Pap. 1878, v. 56, p. 717. of Dec. 20, 1877. And see *ib.* p. 880.
Telegram of Sept. 27, and despatch ^t See *ante*, pp. 141-152.

forbidding the governor to be a party, under the advice of his responsible ministers, to those formal acts which are necessary to bring the grant [in question] under the consideration of the local parliament.' ^u

The undoubted fact that the legislative council would regard the introduction of the proposed vote into the estimates as being, under the circumstances, an attempt to invade their privileges—however open to objection such an act might be as between the two houses—was not a sufficient reason to justify the interposition of the governor in refusing to permit the vote to be submitted to the assembly. For it is his duty to avoid 'the appearance of taking part with one side or the other in controversies which ought to be locally decided,' even when they may involve an issue between the two houses. And the governor could not refuse to follow the advice of his ministers in a case wherein neither the prerogatives of the Crown nor other Imperial interests were involved, merely because the legislative council objected to the course pursued by the assembly. ^v

The governor in disputes between two houses.

For strife between contending parties is best allayed, and harmony between the two co-ordinate branches of the legislature is best promoted, 'by an unflinching maintenance of the principle of ministerial responsibility, and it is better that a governor should be too tardy in relinquishing this palladium of colonial liberty, than too rash in resorting to acts of personal interference.' Satisfactory results in such difficulties are more likely to be 'reached by a strict application of constitutional principles and by the regular working of the machinery of a free parliament.' ^w

In party contests.

^u Com. Pap. 1867-68, v. 48, pp. 625-704.

^v *Ib.* 1878, v. 56, pp. 830, 880.

^w Lord Dufferin's (Governor General of Canada) despatch to the Earl of Kimberley, Aug. 18, 1873;

and the Secretary of State's reply, of Nov. 29, 1873; Com. Pap. 1874, v. 45, pp. 81, 267. See also Lord Dufferin's admirable speech at Halifax, in the summer of 1872, wherein, in a popular and witty vein, yet

Lord
Dufferin's
action in
'Pacific
scandal'
case.

These wise and statesmanlike words are extracted from despatches written by Lord Dufferin in 1873, during his administration of the government of Canada. They express the sentiments which actuated him during his brilliant and successful tenure of office as governor-general of the dominion. But though patient under provocation, and scrupulous to avoid an undue or untimely exercise of prerogative, Lord Dufferin was always prepared, should necessity compel the alternative, to put forth the reserved powers of the Crown rather than permit injustice to be done to the varied and important interests entrusted to his guardianship.

In proof of this, mention may be made of certain political events which transpired in Canada whilst Lord Dufferin was in office, the complete narrative of which will be found in papers laid before the Imperial parliament. I refer to the so-called 'Pacific scandal,' which led to the downfall of the Macdonald administration in 1873.

This powerful ministry had continued in office—with the exception of a brief interval from May, 1862, until March, 1864—ever since the year 1858.

In April, 1873, shortly after a general election, which had resulted in the return of a considerable majority of government supporters, ministers were accused of having trafficked with certain capitalists, by undertaking to secure for them special privileges, in connection with a project to build a railway across the continent to the Pacific Ocean, in order to obtain funds wherewith to bribe the constituencies of the dominion, and so to secure the return to parliament of a majority in favour of the administration.

Great excitement prevailed throughout Canada at these charges. Public opinion was outraged at the thought that they might possibly be true. Inquiry was instituted in parliament; but, for the lack of inquisitorial powers and authority to take evidence upon oath, it proved abortive. Before other steps could be taken, in due

with consummate perspicacity, he describes the true constitutional relations which should always subsist between a governor and his responsible ministers. *Ib.* p. 20.

order, to arrive at the facts, the governor was urged by opponents of the ministry to interpose peremptorily to bring them to account, or to dismiss them from his counsels. Partisan newspapers even assailed his excellency in outrageous and opprobrious terms. But Lord Dufferin remained firm in his adherence to constitutional order. Whilst active in his endeavours, by every lawful proceeding, to prove or disprove the accuracy of the allegations, he steadily refused, so long as they were unsubstantiated, to withdraw his confidence from his responsible advisers.

Lord
Dufferin
and the
'Pacific
scandal.'

Various methods had been proposed to determine the truth of the complaint against ministers, but technical difficulties presented themselves, which provoked delay. At length, by the advice of ministers, a royal commission was appointed to pursue the investigation, cut short by the failure of the parliamentary committee. This commission reported evidence taken before them, but properly refrained from pronouncing judicially thereon, lest their judgment might seem to be to the prejudice of further inquiry by a parliamentary tribunal.

Upon the re-assembling of parliament, the governor caused the evidence taken by the commission, together with his own despatches on the subject to the home government, to be laid before the house of commons. This led to a protracted and vehement discussion, and to the moving of a vote of censure upon the administration, founded upon the facts disclosed in the evidence reported by the royal commission. As the debate proceeded, it became apparent that the ministerial majority could not be relied upon to sustain the government, in the face of the facts brought to light by the commission, which, though they did not prove individual corruption, for personal motives, against particular ministers, sufficed to show that large sums of money had been freely and unjustifiably expended, for the purpose of influencing the dominion elections. In order to prevent the disgrace of defeat, ministers resigned office before a vote was taken, and the leader of the opposition (Mr. Mackenzie) was called upon to form a new administration. He succeeded in this endeavour, and one satisfactory result speedily followed, in the passing of a more stringent election law, with severe penalties against bribery and corrupt practices, an offence which had gradually attained large proportions in Canada, and from which neither party could claim exemption.*

But we are chiefly concerned with the conduct of Lord Dufferin

* See Canada Com. Jour. Oct. Dominion of Canada, v. 2, cc. 35 Sess. 1873; Com. Pap. 1874, v. 45, to 39. pp. 1-269; Tuttle's History of the

Lord
Dufferin
and the
'Pacific
scandal.'

during this trying time. During a period of extraordinary popular excitement, he held the balance between the contending parties with strict impartiality. Although the question at issue was one of local concern, he did not therefore conclude that he had no authority to determine it. The honour of his ministers and the credit of the country were at stake, and it behoved him to be satisfied that none but men of honour and of personal integrity should fill the place of his constitutional advisers, and should wield the authority of the Crown. But he would not hastily assume corruption until it should be proved to exist. He therefore resolved, in the first instance, to leave to parliament to ascertain the truth or error of the charges, before he pronounced judgment upon the question. And when the parliamentary inquiry temporarily failed upon technical grounds, he promoted and encouraged immediate investigation by means of a royal commission, not with intent to withdraw the case from the ultimate cognisance and control of the house of commons, but to enable him to obtain from his ministers in open court those explanations in regard to their conduct which circumstances had rendered necessary, and upon which he had a right to insist.

Throughout all these painful and embarrassing events, Lord Dufferin never lost sight of the fact that he possessed reserved powers, amply sufficient for the occasion, whatever might be his final convictions upon the merits of the case. 'Of course,' he said, in writing to the secretary of state, 'it was always open to me to have dismissed my ministers, and to have taken my chance of parliament approving my conduct, but I did not feel myself warranted in hazarding such a step on the data before me.'^y

And the result amply justified his forbearance. Whatever opinion may be formed upon the merits of the charges themselves, the ministers fell after they had every opportunity of stating their case to the country, and of pleading their cause before a full parliament, comprising a large majority of their elected supporters.

If, by their resignation of office before a vote was taken, they virtually confessed defeat, and that the verdict had gone against them, they could not attribute their discomfiture to 'the uncalled-for intervention' of the governor-general. This result left them with no ground of complaint against the representative of the Crown, who was the last person in the dominion to withdraw his confidence from his constitutional advisers.

In his despatch of November 7, 1873, notifying the Earl of Kimberley of the final issue of this protracted struggle, Lord Dufferin congratulates himself that it had been brought about, 'not

^y Com. Pap. 1874, v. 45, p. 28.

by an ill-considered and hasty exercise of Imperial authority, nor by the application of premature pressure from without, but by the free and spontaneous action of the representatives of the Canadian people.' 'During the whole of this unfortunate business,' he remarks, 'I have never doubted but that a strict application of the principles of parliamentary government would be sufficient to resolve every difficulty, and that a result would be eventually arrived at in harmony with the convictions and wishes of the Canadian people.' But, he significantly adds—in reference to the authority vested in him, as representing the Crown in the dominion—'had it proved otherwise, I still held in reserve a constitutional power, equal to any emergency; and, in the last resort, I should have been quite prepared to have exercised it, in whatever way the circumstances of the case might have justified.'

Lord Dufferin and the 'Pacific scandal.'

In reply to this despatch, Lord Kimberley says: 'I agree with your lordship in the satisfaction which you express that the result arrived at has been reached by a strict application of constitutional principles, and by the regular working of the machinery of a free parliament; and I have much pleasure in conveying to you her Majesty's entire approval of the manner in which you have acted in circumstances of no ordinary difficulty.'^a

During the remainder of Lord Dufferin's career as governor-general, he acquired the confidence and respect of all political parties in Canada, and won the affections of the people, to an extent previously unparalleled. This was exemplified in the cordial expressions of good-will and admiration embodied in the addresses presented to him upon his departure by the dominion parliament, by provincial legislatures, and by every class in the community—tributes, not only to his firm yet impartial rule as governor-general, but also in heartfelt acknowledgment of the lively interest he had displayed and the sagacious counsels he had given upon all matters affecting the progress and prosperity of the Canadian people.

Lord Dufferin as a constitutional governor.

On August 3, 1883, in the New Zealand house of representatives, it was resolved to refer to a select committee for investigation certain charges preferred against the premier and the colonial treasurer, of using their political position for corrupt purposes of pecuniary advantage, and not for the public good. The committee reported the charges to be unfounded, which was agreed to by the house.^b

Charges against ministers in New Zealand.

While on the subject of ministerial charges mention may be made of the following case:—

In the dominion house of commons on May 11,

^a Com. Pap. 1874, v. 45, p. 268. 496, 536; v. 46, p. 629; N. Z. Pap.

^b N. Z. Parl. Deb. v. 45, pp. 303, 1883, I. 13.

McGreevy
case.

1891, Mr. Israel Tarte, member for Montmorency, moved for a select committee to inquire into a series of specific charges that he preferred against a member of the house—Thomas McGreevy—by which the integrity of a minister of the Crown was brought into question.^c

The member set forth in his motion embodying these charges, that Thomas McGreevy, while a member of the house, in his capacity as harbour commissioner, a dominion appointment, used his influence on that board to secure fraudulently, from the public works department at Ottawa, large government contracts in connection with the Quebec harbour works and elsewhere, for a firm of contractors by the name of Larkin, Connolly & Co., whereby extensive frauds—covering a period of eight years—were perpetrated against the government. ‘That during the execution of the works large sums were paid by Larkin, Connolly & Co. to Thomas McGreevy for his services in dealing with the minister of public works, with the officers of the department, and generally for his influence as a member of the parliament of Canada.

‘That in consideration of the sums of money so received by him and of the promises to him made, the said Thomas McGreevy furnished to Larkin, Connolly & Co. a great deal of information; strove to procure and did procure to be made by the department and the honourable minister of public works, in the plans of the graving dock and in the execution of the works, alterations which have cost large sums of money to the public treasury.’ That certain members of the said firm ‘paid, and caused to be paid, large sums of money to the honourable minister of public works out of the proceeds of the said contracts, and that entries of the said sums were made in the books of that firm.’ And that on or about June 4, 1883, ‘a sum of \$1,000 was paid by the firm of Larkin, Connolly & Co. towards “The Langevin testimonial fund”—a fund destined to be given to the minister of public works.’^d

The motion concluded by asking that a select committee be appointed to inquire fully into the allegations, circumstances connected with the several contracts, and all matters mentioned in the statements, &c.; with power to send for persons, papers, and to examine witnesses on oath. By an amendment it was resolved that, instead, the matter be referred to the select standing committee on privileges and elections.

This committee laboriously took the investigations in hand, its

^c For full text of these charges, 1891, pp. 55-59.
see Jour. Canadian H. of Commons, ^d *Ib.* pp. 56, 57, 59.

sittings covering a period of four months, and in its protracted investigations endeavoured to search into the complexity of charges, so far as the material and evidence at its disposal permitted.^e McGreevy case.

In all the committee made seven reports to the house. The first dealt with the refusal of the firm of Larkin, Connolly & Co. to place its books under the control of the committee, or submit to their inspection by any of its members. The second asked permission to sit during the time in which the house was in session. The third asked that its quorum be reduced from twenty-two to eleven. The fourth reported the refusal of Thomas McGreevy, while being examined under oath, to answer to whom he paid a sum of \$20,000, being a portion of a larger sum he had received from his brother, paid by the firm of Larkin, Connolly & Co. for political purposes: also his refusal to state whether any portion of the money had been paid to any person in the interest of the minister of public works. The fifth stated the difficulty experienced in carrying out the usual practice of the house in obtaining the signatures of witnesses appended to the evidence, owing to the large number of witnesses, and the voluminous nature of evidence; the committee being of opinion that the signing of evidence was not essential in view of its having been taken down by shorthand writers; permission was therefore asked to be allowed to depart from the usual practice.

In reference to the first report the house ordered the attendance of Mr. Connolly at the bar, where he was permitted, through counsel, to state his reasons for having refused to comply with the demand of the committee. On such being heard the house ordered the production and delivery of the books to the clerk of the house,^f which was duly complied with.^g The second, third and fifth reports received the concurrence of the house. On the fourth report the house resolved that Thomas McGreevy attend at his place in the chamber on the 18th inst. at three o'clock,^h but this he failed to do, when the serjeant-at-arms was instructed to take him into custody.ⁱ At its next sitting the speaker read to the house Mr. McGreevy's resignation as member for the electoral district of Quebec West, and said that he had issued his warrant for a new writ of election. But here the attention of the house was called to the fact that a member had stated that the election of Thomas McGreevy was then being lawfully contested; thereupon a resolution was passed empowering the committee on privileges and elections to inquire into and report to the house if the election of Thomas McGreevy was being con-

^e Appx. to Jour. H. of Com.
1891, v. 1, No. 1, pp. 1-4 *nn*.

^f Com. Jour. 1891, p. 212.

^g *Ib.* p. 214.

^h *Ib.* p. 407.

ⁱ *Ib.* p. 422.

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tested at the date of his resignation, and if such fact be founded in the affirmative, whether the warrant of the speaker should have issued, and what practice should be adopted with reference to similar cases in the future.

The committee in its sixth report dealt with this question, stating that the seat was being lawfully contested, and that the contestation was pending at the time the resignation was tendered; it recommended, under the circumstances, that the resignation be not acted upon, and that the issue of a new writ be recalled; also affirmed that under the present state of the law the speaker, when not aware of the contestation of the election of a member, might properly act on the receipt of a resignation, to issue his warrant for a new writ; and concluded by recommending for the consideration of the house the advisability of repealing clause 7, chap. 13, of the revised statutes of Canada.^j Subsequently the speaker informed the house that he had issued a warrant of *supersedeas* to stay all proceedings of the new writ.^k On August 20, the serjeant-at-arms reported that after diligent search he was unable to find Thomas McGreevy.^l On the 29th of the month following Mr. McGreevy was expelled from the house 'for having failed to obey its order to attend in his place therein, and having been adjudged by this house guilty of certain of the offences charged against him.'^m

The committee on privileges and elections assigned to a sub-committee—composed of five of its members—the task of preparing a draft report upon the charges. On September 16, the sub-committee reported that it held several sittings but was unable to come to a unanimous conclusion; it therefore submitted two reports, one a majority report signed by three members, and a minority report signed by two. The committee adopted the former, which was presented to the house as its seventh and final report on the charges preferred against (1) Thomas McGreevy, (2) the department of public works, and (3) the Hon. Sir Hector Langevin.ⁿ

This report found Thomas McGreevy guilty—in the main—of the charges brought against him, in regard to the minister of public works and his department. Its concluding observations state:—

'This conspiracy has been all the more powerful and effective by reason of the confidence which the late minister of public works had in the integrity and efficiency of his officers, and by reason of the confidence which the late minister entertained with regard to Thomas McGreevy, and has accomplished results which are to be

^j Jour. H. of Com. 1891, p. 467.

^k *Ib.* p. 477.

^l *Ib.* p. 422.

^m *Ib.* p. 561.

ⁿ Majority Report lettered 'A.'

Appx. Jour. H. of Com. 1891, No. 1, p. *iva*.

greatly regretted as regards the administration of the department, and greatly to be condemned as regards those who lent themselves knowingly to the purposes of the conspirators. McGreevy case.

‘The charges against Sir Hector Langevin, as already intimated, having been as above set forth, the committee would observe that in course of the investigation an effort was made to connect him with the wrongdoing of others, who have been reported against as directly connected with fraudulent conduct.

‘Your committee, therefore, report that the evidence does not justify them in concluding that the minister knew of the conspiracy before mentioned, or that he willingly lent himself to its objects.’

The minority report^o took an opposite view of the case as far as the implication of the minister and department was concerned. In its findings on the different charges it claimed that the evidence showed the minister to be cognisant of the facts of the letting of the contracts, where, in some cases specified, he had been guilty of the violation of public trust, and that frauds were perpetrated at least with his passive contrivance. It pointed out that ‘the relations existing between the Hon. Thomas McGreevy and Sir Hector Langevin have for the past twenty years and more been of the closest and most intimate kind. As far back as 1876 Mr. McGreevy appears to have advanced for Sir Hector a large sum of money (\$10,000) to pay his election expenses, and have taken his notes of hand therefor. These notes have been renewed every three or four months since then, and are still outstanding.’^p

In its conclusions it states ‘that the manner in which the several contracts were obtained by Larkin, Connolly & Co., from the public works department and the Quebec harbour commissioners, the modifications subsequently made in these contracts in the interests of the firm, the enormous sums of money paid and allowed to them out of the public funds for extras and for damages, indicate without any reasonable doubt that this firm had gained a controlling influence over the minister and department of public works.’^q

The majority report was adopted by the committee on a vote of seventeen against nine.

When presented to the house, on motion for its adoption, an amendment to the amendment was moved, to the effect, that having regard to the constitutional rule of responsibility to parliament of a minister for the administration of a department over which he presides, the late minister of public works ‘cannot be absolved from

^o Appx. to Jour. H. of Com.
1891, No. 1, p. lxxxii.

^p *Ib.* p. lxxxii b.

^q *Ib.* p. lxxxii ss.

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The division on the amendment for the minority report was lost, when the main question, for the concurrence of the seventh report of the committee, being the majority report, was carried on a division of 101 to 86, being a party vote, with the exception of two members on the government side who voted with the minority.^s

Charges preferred against a minister of the Crown.

In the dominion house of commons, on April 6, 1892, the following charges were made by a private member, on the opposition benches, against a minister of the Crown :—

That James D. Edgar, the member representing the electoral district of the West Riding of the county of Ontario in this house, having stated from his place in this house that he is credibly informed and believes that he can establish by satisfactory evidence :—

1. That during each of the years 1882 to 1891 inclusive, the Quebec and Lake St. John Railway Company received by way of bonus from the dominion of Canada subsidies amounting in the aggregate to upwards of one million dollars, which subsidies were voted by parliament on the recommendation of the ministers of the Crown.

2. Arrangements were entered into by the said railway company whereby the expenditure of said subsidies was made by a construction company through or in conjunction with one H. J. Beemer, a contractor, and the said Beemer and those who assisted him in financing for the said railway works, received the benefit of the said subsidies.

3. During the whole of the said period from 1882 to 1891, the Hon. Sir Adolphe P. Caron was, and still is, a member of the house of commons of Canada, a member of the Canadian government, and one of her Majesty's privy councillors for Canada.

4. That the said Sir A. P. Caron was, during the whole, or the greater part of the said period, one of the members of the said construction company, and thus had means of knowledge of, and did know of the dealings with the said subsidies, and their destination after they were paid over by the government to the said railway company.

5. That during the said period, and while the said railway was being constructed in part by means of said subsidies, the said Sir A. P. Caron corruptly received large sums of money out of the said subsidies, and from monies raised upon the credit of the same, and from parties beneficially interested in the same.

6. That during the said period out of said subsidies, and out of monies raised upon the credit of the same, and from parties beneficially interested in the same, large sums of money were from time to time corruptly paid

^r Moved by Mr. Dalton McCarthy. Jour. H. of Com. 1891, p. 528.
^s Ibid. p. 531.

and contributed, at the request and with the knowledge of said Sir A. P. Caron, for election purposes, and to aid in the election to the house of commons of the said Sir A. P. Caron, and other members and supporters of the government, of which he was a member, and that after some of such last-mentioned corrupt payments and contributions were made, further and other subsidies were granted and paid to the said railway company by the government of which Sir A. P. Caron was a member.

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7. That the Temiscouata Railway Company was given incorporation by letters patent issued by the Canadian government on October 6, 1885, and since that date the said railway company has received from the dominion of Canada subsidies to the extent of \$649,200—which subsidies were voted by parliament on the recommendation of ministers of the Crown.

8. That since October 6, 1885, and while the said Temiscouata railway was being constructed in part by means of the said subsidies, the said Sir A. P. Caron corruptly received large sums of money from the persons who from time to time controlled the said Temiscouata Railway Company and the said subsidies, or who were beneficially interested in the said subsidies.

9. That also since the said October 6, 1885, the persons who from time to time controlled the said Temiscouata Railway Company and the said subsidies, or who were beneficially interested in the said subsidies, paid and contributed large sums at the request, and with the knowledge of the said Sir A. P. Caron, for election purposes, to aid in the election to the house of commons of the said Sir A. P. Caron, and other members and supporters of the government of which he was a member, and that after some of such last-mentioned corrupt payments and contributions were made, further and other subsidies were granted and paid to the said railway company by the government of which the said Sir A. P. Caron was a member.

10. That the said sums of money hereinbefore mentioned in paragraphs 6 and 9, as paid and contributed for election purposes, were so used, together with other sums contributed by public contractors with the dominion government, and were controlled and distributed by the direct authority, and with the knowledge of the said Sir A. P. Caron, in lavish and illegal amounts, for the purpose of corruptly influencing the electors; and in the general election of 1887 alone, upwards of \$100,000 of monies so contributed were so used for the purpose of corruptly influencing the electors in the following electoral districts, that is to say: the counties of St. Maurice, Champlain, Lévis, Montmorency, Charlevoix, Kamouraska, Temiscouata, L'Islet, Dorchester, Berthier, Portneuf, Quebec, Gaspé, Rimouski, Montmagny, Bellechasse, Beauce, and Mégantic, and in Quebec West, Quebec Centre, Quebec East, and Three Rivers.

That the above statements be referred to the select standing committee on privileges and elections, to inquire fully into the said allegations, with power to send for persons, papers, and records, and to examine witnesses upon oath or affirmation, and that the committee do report in full the evidence taken before them, and all their proceedings on the reference, and the result of their inquiries.

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In reply to these charges, Sir A. P. Caron declared them to be false in every particular, informing the house that he had unsolicited received letters and telegrams from the managers of both companies concerned, giving expression to that effect. He considered this announcement sufficient at the present stage of the proceedings.

The leader of the government¹ then stated that it rested with the house to carefully consider how far it should accede to the request of a member, in preferring charges against the personal character of another, in entertaining and investigating such charges. That in so doing the house undertook to act in a judicial capacity towards a fellow member, and ought to be cautious as to the character and class of charges with respect to which it would undertake to exercise such judicial functions. That the house had an undoubted right at any time to inquire as to the expenditure of public monies by the departments of government, or by others entrusted with expenditure. But such a class of cases was altogether aside from the present one, as in these charges there was no reference to any complaint of that character; no allegation of any public money having been misappropriated or maladministered. That the house would take cognisance of an offence alleged to have been committed by a member in his capacity as such, but the constitution did not confer the right to judge of the private character of any member, such being left to the constituencies of which he is the choice. Only when he betrays his trust by a breach of duty as a member has the house any right to inquire into his conduct, or any power to affect his status in the house by any resolution involving his seat. Looking at the charges made, it was clear that they had not reference to administration of public money, as before outlined; because they amount to this, 'that two companies to which monies were voted by parliament on several occasions, and another company which had obtained possession of the money given them for the purpose of expenditure, appropriated a portion of the monies which had thus been voted, not for the purposes of their own enterprises, but for the purpose of aiding the hon. the post-master-general in his own election, and in others in which he was interested, and in which supporters of the government were candidates. That 'it will not do at all to say that some charge is implied, that some charge is put forward which may be capable of one construction, and equally capable of another construction. The house has to see specially, when charges are deliberately framed, as these have been, that they bear that plain construction upon

¹ Sir John Thompson, Can. Hans. 1892, v. 1, p. 1040.

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their face, and that the member who makes them shall not afterwards be in a position to say that he did not intend to make such a charge, but that he intended to charge some personal and private impropriety, or some breach of the election laws upon the member whom he accuses. . . . That when accusations of improper conduct are made, even against members of parliament as such, we ought to consider most carefully whether it is imperative upon the house to exercise its judicial functions, which we so rarely like to exercise, and which we so rarely exercise well, considering the diversity of feelings, of interests, and even of political passions, which are apt to prevail in an assembly like this. We have to consider whether the accusations which are brought forward are accusations which some better qualified tribunal in this country is not clothed with powers to determine. If the constitution has erected a tribunal in the country which has jurisdiction over such matters, and if the laws which govern us all, us as well as our constituents, give to these tribunals a right and a procedure to carry on the investigation, it is most proper that the house should, if possible, decline to exercise any judicial functions on its part, and leave to the tribunal which is qualified by the constitution and statutes of this country the power, right and duty to determine and investigate the complaint.' That before making arrangements for the trial of a member there ought to be some charge made against him in his capacity as a member of the house. However improper it might be for a member to violate election acts, that was not a question with which the house should deal, for over such matters the courts had jurisdiction, and it would be 'unbecoming and improper from every point of view that this house should attempt to resume that jurisdiction.' The premier submitted 'that this is an attempt on the part of the hon. member for West Ontario to investigate bygone elections which have taken place in this country, and nothing more.' That the charges were of such a vague character—especially with reference to paragraph 10—that if an act had not been passed empowering the courts to deal with election cases, the house would not adopt any such resolutions as these. After the long and tedious experience of trial before the committee on privileges and elections in the previous session, it was agreed that the committee—of over forty members—was too large for quick and prompt deliberation.

By a leading member of the opposition^u supporting the motion, it was contended that the line of argument adopted by ministers was an extraordinary one in undertaking to burke an investigation into charges, and in limiting the authority of the house. That

^u Speech by Hon. D. Mills, Can. Hans. 1892, p. 1052.

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members had been frequently expelled from the Imperial parliament on grounds of their private misconduct. Election courts had nothing whatever to do with the consideration of the matters embraced in the proposition, but dealt with irregularities connected with the election of a particular person against whom certain charges had been made ; beyond that their powers did not extend. That, in the memory of the speaker, an important case in the province of Quebec occurred where charges of misconduct in the administration of public affairs had been preferred against a member on trial of an election petition, the court deciding that it was not a matter for its consideration, but for parliament to deal with ; which decision was sustained by the supreme court. The use of public money for the purpose of corrupting the electors by a member of the administration was a proper matter for investigation by the house, and was in no way restricted by the reference of election petitions to the trial of the courts. That the charges pointed to the member in his official capacity, as an administrator, rather than as to his conduct as a private member. In effect they pointed to the fact that the Crown had been advised to appropriate large sums of money, which had been diverted from its purpose and placed in the hands of a minister of the Crown for the purpose of corrupting the electorate. That the minister who advised this appropriation was the postmaster-general, and that he had used a portion of the subsidies from the companies for his own and other elections. The government and parliament of England have adhered strictly to the principle of the sole right of parliament, through the house of commons, to investigate such matters, and not by means of a commission subordinate and responsible to the government. In a question of misappropriation of public money the people's representatives have the right to know of its use or misuse. To state that parliament is an inconvenient body for such an investigation is to attack the whole parliamentary system. That there is not in the history of England an instance where such an investigation has been made by a commission appointed by ministers of the Crown. A commission, being the creature of an administration, is appointed to investigate the conduct of those subordinate to the government ; but if called upon to investigate charges against a member of the treasury bench, such a person would be in the position of adviser as to who should be appointed to try him. That ' the sole tribunal to whom the ministers of the Crown are responsible is this parliament, and when a charge is made against a minister of the Crown, an investigation ought to be had in this parliament, and a report made as to whether the charge is well founded or not.'

On May 4 an amendment to Mr. Edgar's motion was introduced

by the government. Not only were the main charges recapitulated, though in different phraseology, but the chief points urged by the speakers on the opposition side were summarised and made objects of the investigation. Instead, however, of referring the matter to a committee of the house, it was moved :—

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That the house deems it proper and convenient that the evidence relating to such allegations and charges should be taken by one or more commissioners to be appointed under chapter 114 of the revised statutes of Canada, and having all the powers mentioned in said chapter, and that such evidence should be laid before this house when completed.

And a debate arising thereon, Sir Richard Cartwright moved in amendment to the proposed amendment, That all the words in the amendment be left out, and the following words be added to the main motion :—

‘That this house refuses to allow the investigation into the charges preferred by Mr. J. D. Edgar, a member of this house, in his place in the house, against Sir Adolphe Caron, also a member thereof, to be removed from the control of parliament and to be committed to one or more commissioners appointed on the recommendation of the said Sir Adolphe Caron and his colleagues.

‘That this house views with repugnance the proposition to permit the person accused to vary and alter the charges preferred against him, and instead thereof to substitute a new set of charges drawn up by himself or his colleagues; and that such a demand, no less than the proposal that the said charges should likewise be investigated by persons to be appointed by himself and his colleagues, is entirely unprecedented, and is opposed to parliamentary law and usage as settled by the practice of the mother country; is a violation of the privileges of members of this house, and is designed to elude and defeat the ends of justice.’

On division the amendment to the amendment was lost, by a strictly party vote of 63 to 125; and the amendment proposed by ministers adopted on a similar vote reversed.

It was then moved and adopted, ‘That the names of the said commission or commissioners be submitted for the approval of this house before his or their appointment.’^v

When the names of the commission—two judges of the Quebec superior court—were subsequently submitted for concurrence of the house, an amendment was moved by the leader of the opposition, that, instead, the matter be referred to a committee of five members, which was lost.^w

Mr. Edgar was advised that the commission would sit on September 20, when he was invited to furnish a list of witnesses for examination.

In his reply to the commissioners, Mr. Edgar reviewed the

^v Jour. H. of Com. Can. 1892, p. 284.

^w *Ib.* p. 334.

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action of ministers in the house in having altered the charges preferred by him, and stated that those, as passed by the house and submitted for investigation to the commission, omitted essential portions of his charges, while they included charges 'which he had neither made, suggested, nor believed to be true.' He, however, appended a list of witnesses that he would have submitted for examination had the inquiry been based on the motion made by him in parliament.^x

In the following session, 1893, the royal commission on the Edgar charges reported to the secretary of state a mass of evidence as a result of its labours in the inquiry, which was duly presented to parliament.

When the evidence came before the house of commons for discussion it was claimed by Mr. Edgar,^y in effect, that :—

From 1882 to 1892 the Quebec and Lake St. John railway company had received subsidies from the dominion government, amounting in the aggregate to over a million dollars.

That this railway in 1878 entered into a contract with a construction company—of which the postmaster-general was a shareholder and director—to build the St. John railway throughout, in consideration of the transfer to the construction company of all its bonds and subsidies voted and to be voted by parliament to the line.

That by financial arrangements made between the builder of the road and the president of the construction company, Senator Ross, the builder made over all subsidies, &c., to Mr. Ross personally.

That as a director and shareholder of this construction company the minister was in the position of a partner in a firm of contractors, drawing subsidies for which he voted and used his influence to obtain.

That in 1887, on the eve of a general election, the postmaster-general applied to Senator Ross for assistance to a general election fund, and received from him \$25,000; though professedly given as a gift by Mr. Ross to the minister, the evidence showed that Mr. Ross had charged it against the account of the builder of the road; and further, that the subsidies voted the year following this transaction, and subsequent years, paid back to Mr. Ross more than tenfold to the giver.

For these and other reasons advanced, the speaker concluded by moving—in effect—that the evidence of the royal commission on the charges having been in the possession of the government (at the time of its reorganisation), should have prevented the subsequent appointment of the postmaster-general to be an adviser of the Crown, and rendered it highly improper that he should continue to hold that office.^z

^x For copy of Mr. Edgar's letter see Toronto 'Globe' and 'Mail' for Sept. 16, 1892.

^y For Mr. Edgar's speech see Can. Hansard, 1893, pp. 2822-2843.

^z *Ib.* p. 2843.

The solicitor-general, in defence of the postmaster-general,^a examined critically the evidence of the commission, and quoted largely from it to justify the conclusion that the charges made against the minister, which he reviewed in detail, were not proved in any particular, but on the contrary were disproved from beginning to end ; that there was not a tittle of evidence to show that one dollar of the dominion subsidies had been corruptly applied.

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By the minister of public works^b it was pointed out that Mr. Edgar's motion placed the matter on a different footing to what it was when first introduced in the house in the previous session, and assumed, in its new form, a vote of want of confidence in the government. That the arguments advanced by other speakers have placed the question in a twofold aspect before the house.

'The first is, whether the fact of the hon. postmaster-general being a member and director of the construction company of the Lake St. John railway was of a nature that ought to have prevented the premier, when he formed his cabinet, from calling the hon. postmaster-general to office. Was the conduct of the postmaster-general improper, illegal, unlawful, or criminal? An act cannot be a criminal one, it cannot be an illegal one, it cannot be an unlawful one, when there is nothing in the law to prevent it. The same argument may be applied to a member of parliament as well as to a member of the government. Is it proper for a man to occupy a position in a joint-stock company, as a shareholder or director, who has anything to do with the government, and who hopes or expects any subsidies to be granted to his company? Is there anything in the law to prevent it? There is nothing that will prevent that, either at common law or in the independence of parliament act, which controls the conduct of members of this house in such matters. Therefore there was nothing improper in the hon. postmaster-general being a member of that company. Besides, I may add not only was it not improper, but members of the government and members of this parliament are very often placed under the necessity of forming part of companies, railway companies or otherwise, formed for the purpose of benefiting their own county, or the section of country which they specially represent. When the hon. postmaster-general was asked to form part of that company he was a member of the house, it is true, but he was not a member of the government; and when the house takes notice of the admission made by the hon. member for North Simcoe (Mr. McCarthy), that he for one has no doubt that the hon. postmaster-general never did anything to benefit himself personally, this ought to dispose of that part of the accusation *in toto*. If there is an hon. member in this house who is ready to rise in his seat and say that the hon. postmaster-general has put into his pocket a single cent of that money coming from the subsidies, then it

^a Mr. Curran. For his speech see Can. Hansard, pp. 2843-2871.

^b Hon. Mr. Ouimet. *Ib.* pp. 2914-2918.

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will be time enough to discuss the matter, as a question of evidence, and see if the conduct of the hon. postmaster-general was illegal or improper, or of such a nature as to oblige the prime minister to take notice of it; because the question now before the house is this: Whether Sir John Thompson, the premier of this country, was right or wrong, and whether he is to be censured or not, for having done what he has done—that is, for having taken the hon. postmaster-general into his cabinet. This vote involves a vote of censure against our premier personally; it is not a vote of censure against the leader of the house, or against any other member of this government here; it is a vote of censure against Sir John Thompson, personally, for having done what the hon. member for West Ontario (Mr. Edgar) is pleased to call an improper thing, and what the hon. member for South Oxford (Sir Richard Cartwright) is pleased to call an outrage on the constitution of this country.

‘There is a second question: Was the money obtained corruptly by Sir Adolphe Caron from the late Mr. Ross? As to that, there is not a tittle of evidence that will lead any hon. member of this house to say that Sir Adolphe Caron went to the late Mr. Ross and made any bargain with him, or solicited him to furnish that money, and promised him that he would be recouped in one way or another. Not only that, but there is not a tittle of evidence to show that Sir Adolphe Caron knew, at any time, that that money was to be recouped to the late Mr. Ross by the contractor; and I say more, even if he had known that the contractor would be called upon afterwards to repay it, this would not constitute an evil or corrupt intent which would make the act illegal.

‘I say that until you prove that there was an understanding between the postmaster-general, the St. John railway, the late Mr. Ross, who was president for some time of the company, and the contractor, or any other person who might have acted as a go-between—you have no case against the postmaster-general. If there was any evidence of that, I would say that my hon. friend from West Ontario had proved his charges, but there is nothing of that kind proved. . . . It may be, in the opinion of a good many persons, improper that the law concerning the independence of members of this house should allow any member to hold the position of shareholder or director of a joint-stock company which has anything to do with the government. That is a fair proposition to discuss. I know that a good many members, on this side or the other side, may be influenced by this very consideration, that they do not think that it is proper for a member of this house to belong to any company whose interests are intimately connected with politics in the shape of government subsidies. But is that a reason why the postmaster-general should be censured, or why the premier of the dominion should be censured? There was nothing done contrary to law, though there may be a certain opinion that what was done should not have been done.’

This closed the discussion, and on the house dividing, Mr. Edgar's motion was lost on a division of 69 to 119.*

* Can. Hansard, 1893, p. 2919.

In further illustration of the position of a constitutional governor, in colonies having responsible government, and of the influence and authority appertaining to the office, notwithstanding the gradual emancipation of such colonies from Imperial control, the following cases may be cited :—

Precedents of interposition by governors in local questions.

In 1858, Sir William Denison, governor of New South Wales, successfully opposed an endeavour on the part of his responsible advisers to increase largely the number of members of the legislative council, for the purpose of securing a ministerial majority in that chamber. In the following year, Governor Denison was obliged to warn his ministers that a certain measure which they had in contemplation was at variance with law, and calculated to override the law, without due warrant of parliament. He succeeded in convincing them of this, else he had resolved to dismiss them from office.⁷

Sir W. Denison.

In 1861, Sir Alexander Bannerman, the lieutenant-governor of Newfoundland, being dissatisfied with the reasons given to him by his prime minister (Mr. Kent) for submitting to the local legislature a bill affecting the salaries of employés in the civil service of the island, dismissed the ministry, and entrusted the formation of a new administration to Mr. Hoyles, the leader of the opposition in the assembly. Mr. Hoyles succeeded in this undertaking, but, being in a minority in the assembly, requested the governor to dissolve the legislature, to which his excellency acceded. Meanwhile, the assembly, on March 5, 1861, passed resolutions protesting against the change of ministry and the proposed dissolution, and negatived a motion to go into a committee of the whole house on ways and means. Whereupon, two days afterwards, the legislature was dissolved by proclamation; a certain bill, which had passed both houses, having been previously assented to by proclamation. The result of the elections was favourable to the new ministry, and the objectionable measure which had been disapproved by the governor was not again brought forward.

Sir A. Bannerman.

In a despatch to the secretary of state for the colonies, narrating these events, Governor Bannerman remarks :—‘Mr. Kent’s affair was a serious one. The new system of [responsible] government, which was conceded in 1855, instead of lessening, increases a governor’s responsibility. A bad ministry, with a corrupt majority, may do many things which a governor cannot help. But I could

⁷ Denison’s Viceregal Life, v. 1, pp. 435, 468.

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not for a day continue to administer the government of a colony, unless I had the power to dispense with the services of my ministers, and appeal to the country. But in doing this a governor must submit to many things, and look to what the consequences may be to the interests of the people.'²

Sir J. Young.

In January, 1865, Mr. Martin, prime minister of New South Wales, urged upon the governor of the colony (Sir John Young, afterwards Lord Lisgar) the expediency of appointing two additional members to the legislative council. The governor declined to sanction this proceeding, on the ground that it was at variance with an implied understanding in regard to such appointments, which ought only to be made for the convenience of legislation, and not in order to strengthen a party. This refusal led to the resignation of the ministry. The secretary of state, however, in a despatch dated May 26, 1865, expressed his approval of the governor's conduct, and his belief that the reasons alleged for refusing compliance with the recommendations of ministers were sound and convincing. Four years afterwards, a similar request was preferred by the then premier (Mr. Robertson) to the governor (Lord Belmore), to the effect that three new members should be added to the upper chamber. But Lord Belmore declined to act upon this advice; and the appointments were not made. Shortly after, the premier resigned, but for reasons unconnected with this decision. Upon being informed of Lord Belmore's refusal to accept this recommendation, the secretary of state approved of the governor's determination.^a But see recent case (1893) in New Zealand on this subject (*post*, p. 820).

Lord Belmore.

In 1872, the question was again mooted; and Mr. (afterwards Sir Henry) Parkes, the premier at that period, expressed a strong desire that the existing tenure of legislative councillors—by nomination of the Crown—should be exchanged for that of popular election. In a minute submitted to the governor upon the general question, Mr. Parkes stated 'that the working of the principle upon which the council is based has invoked the interference of her Majesty's secretary of state, in a manner not expressly sanctioned by law; and which, with expressions of deep regret, your excellency's advisers cannot but consider incompatible with the rights of self-government, secured to the colony by the constitution.'

Sir H. Robinson.

At this time, Sir Hercules Robinson was governor of the colony, and he met Mr. Parkes' complaint by pointing out that it was

² This despatch is cited in a letter to the Reform Association of Ontario, from ex-Governor Letellier, dated Oct. 2, 1879, in the 'Toronto Globe,' of Oct. 3. And see

Newfoundland Assem. Jour. March 5 and 6, 1861.

^a New South Wales Leg. Assem. Votes, &c., 1872-73, v. 1, pp. 534, 535.

founded upon a misapprehension. He showed 'that in every instance, when questions have arisen as to the appointment of additional members of council, the governor has acted on his own responsibility, without previous reference to the secretary of state, and that, when the course adopted has been reported home, the secretary of state has simply expressed his opinion as to the propriety or otherwise of the governor's proceedings—an opinion which, on one of the occasions referred to, was specially invited by the minister who conceived himself aggrieved by the governor's decision. The understanding between the leading politicians in 1861, as to a limitation in the ordinary number of the council, was not come to in consequence of any suggestion from home, nor was it even reported to the secretary of state for several years.'

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Sir Hercules Robinson's explanation on this subject was confirmed by the colonial secretary (Lord Kimberley), who, in a despatch dated November 29, 1872—while he deprecated any hasty legislation upon a matter so difficult and momentous as an amendment to the constitution—expressed a hope that the local ministry would refrain from such an act 'for the sake of the permanent interests of constitutional government in the colony, in the working of which her Majesty's government cannot but take a deep interest, although they seek in no way to interfere with its internal administration.'^b

The project for changing the constitution of the legislative council in New South Wales was afterwards abandoned. On March 14, 1876, a motion in favour of an elective legislative council was negatived, in the legislative assembly, by a vote of thirty-three to five,^c and the upper chamber in that colony continues to be nominated by the Crown.

In the colony of New Brunswick, in April, 1866, a ministerial crisis occurred, in consequence of the action taken by the lieutenant-governor (Mr. A. H. Gordon) in furtherance of the proposed confederation of the British colonies in North America. The expediency of agreeing to this union—upon certain terms, arranged at a conference of delegates from the several colonies concerned, which was held in Quebec in October, 1864—was a test question at the New Brunswick general elections in 1865; and a large majority of members, opposed to the union, were returned to the assembly at that time.

Governor Gordon on the union question.

The lieutenant-governor was, nevertheless, of opinion that the earnest desire which the Imperial government had expressed in

^b New South Wales Leg. Assem. Votes, &c., 1872-73, v. 1, p. 536.

^c *Ib.* 1875-73, p. 214.

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favour of the union, justified him in again recommending the question to the consideration of the local legislature ; more especially as he believed that a vast change had recently taken place in the public sentiment on this question. Ministers differed with the governor in this conclusion, and objected to the course he proposed to take. They reluctantly consented, however, to a less formal discussion of the union question, with a view to discover whether some basis of agreement in accordance with the declared wishes of the home government might not be found. At this juncture, the legislative council passed an address to the Queen, in favour of the projected union, and presented the same to the governor, for transmission to her Majesty. In acknowledging the receipt of this address, the governor made use of language which his ministers deemed to be inconsistent with their policy on this question. They accordingly resigned ; although, at the time, they were able to command a majority in the house of assembly. His excellency at once formed a new ministry, who undertook to sustain his action in the matter.

A series of resolutions, condemnatory of the address of the legislative council, and expressing disapproval of the governor's conduct, were about to be proposed in the house of assembly, when, upon the advice of the new administration, the legislature was prorogued, and shortly afterwards dissolved. The ex-ministers, and their supporters, who constituted a majority in the assembly, were indignant at this proceeding, and forwarded, through the governor, an address of remonstrance to the Queen. But, at the ensuing general elections, a large majority of members in favour of a union of the provinces was returned. Upon the reassembling of the legislature, the new assembly passed an address, expressing their belief that the constituencies had justified the course adopted by the governor upon this occasion.^d

A still more remarkable instance of prompt and decisive action on the part of a governor, in the interest of the colony over which he presided, but in direct opposition to his ministry for the time being—and notwithstanding their possessing the confidence of the local parliament—took place in New Brunswick a few years previous to the events above narrated.

In 1855, a prohibitory liquor law was passed by the New Brunswick legislature. But the act proved to be wholly inoperative, and incapable of enforcement. Whereupon the lieutenant-governor

^d New Brunswick Assem. Jour. 1866, pp. 74, 83, 202, 224.

(J. H. Manners Sutton), without expressing any opinion upon the principle of prohibitory legislation, sent a memorandum to his ministers, in which he expressed his conviction that a continuance of the existing condition of affairs was fraught with peril to the best interests of the community, and called for immediate remedy. He, therefore, suggested a dissolution of parliament, with a view to a decided expression of public opinion in favour of, or in opposition to, the prohibitory principle. Ministers dissented altogether from his excellency's conclusions, and would not advise a dissolution. Further correspondence ensued, without a change of opinion on either side. Finally, the lieutenant-governor stated that, as he 'never contemplated a dissolution of the assembly without the concurrence of responsible advisers,' he claimed that either the executive council should assume the responsibility for the issue of a proclamation of dissolution or that they should retire, and enable him to seek for other advisers, who would consent to this act. As ministers still demurred to either course, his excellency directed the provincial secretary to prepare and countersign a proclamation dissolving the assembly. His request was complied with, but immediately afterwards the ministry resigned. The governor requested them to retain office until their successors were appointed. In nine days he notified them that he had succeeded in forming a new administration, who, agreeing with him in the necessity for an immediate dissolution of parliament, were prepared to assume responsibility for the same.

Governor Manners Sutton on prohibitory liquor act.

The elections were held without delay ; and, in less than three months after the change of ministry, an extra session of the legislature was convened. It was of very brief duration. But, in answer to the speech from the throne, both houses expressed their satisfaction at the governor's judicious exercise of his constitutional powers, and at the promptitude with which he had had recourse to the advice of parliament. A bill to repeal the prohibitory liquor law was submitted to the assembly, as a ministerial measure. It passed, by a vote of 38 to 2 ; and was agreed to by the legislative council without a division. Thus, both the constitutionality and the expediency of the governor's action, on this occasion, were distinctly ratified by both houses.^e

In 1861, Sir William Denison, governor of New South Wales, being about to relinquish his office, and desirous before his departure to settle a long-standing dispute, in reference to a land claim, in conformity with instructions received from the Imperial government, requested the colonial secretary to affix the great seal of the

Governor Denison on a land-grant.

^e New Brunswick Assem. Jour. 1856, pp. 8, 23, and 1857, p. 88.

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colony to a grant of land to the claimant. The secretary disapproved of the proposed grant, and declined to be a party to the proceeding, or to become responsible for it. The governor then desired him to hand over the seal and his excellency sealed the document himself. This irregular proceeding led to the resignation of the whole ministry ; though, at the request of the governor, they resumed office. Shortly afterwards, the local parliament met, when an attempt was made in the legislative assembly to pass a vote of censure upon the ex-governor for his conduct on this occasion. But the motion was negatived upon the previous question being proposed thereon.^f

Sir H. Robinson.

In 1876, the then governor of New South Wales (Sir Hercules Robinson) objected to affix his sign-manual to land grants, until some more effectual system had been devised to ensure genuineness, and to prevent fraud by the tender of spurious grants for his sanction and signature. This led to the adoption of improved regulations in the premises, and of a constitutional rule that each deed should be duly authenticated by the signature of the minister for lands before it was submitted for the governor's signature.^g By this method, unity of action between the governor and his ministers in such matters was secured, and the liability of fraudulent grants being surreptitiously obtained was proportionably diminished.

Governor Weld on unauthorised expenditure.

On April 23, 1877, the sanction of the governor of Tasmania (Mr., afterwards Sir, F. Weld) was requested, by ministers in council, to the payment of a certain sum to an individual pursuant to an award upon a claim against government. His excellency objected to the payment, because the previous sanction of parliament to this appropriation of public money had not been given ; and the matter was dropped. At a later meeting of council, however, the prime minister informed the governor that, unknown to himself and in anticipation of the governor's assent, the sum awarded had actually been paid to the claimant, prior to his excellency's refusal to sanction the same on April 23. Thereupon the governor recorded in a formal minute his desire 'to impress upon ministers the impropriety of signifying his assent' to any matter, not of mere routine, before it had been actually given.

The governor was aware that, in all colonies and under all governments, it has been usual in mere matters of routine, when it would be inconvenient to see the governor, that a minister should, on his own responsibility, assume a consent that would certainly be afforded. And, in the present instance, the governor was entirely

^f Austral. Dict. of Dates, pt. 2, 743.
^g *Ib.* 1876-77, v. 1, pp. 208, 693.
 p. 255. New South Wales Assem. Votes, 1861, v. 1, pp. 58, 416, 647-

satisfied that the departure from regular practice had been accidental and unpremeditated. Being also convinced, from the explanations offered by ministers, that there was every reason to suppose that parliament would approve of this expenditure, he stated that he would not refuse to legalise an act already performed, as he believed, in good faith by his ministers in a purely colonial matter.^h

Governor's interposition in local questions.

In New Zealand, in November, 1877, ministers submitted to the governor (the Marquis of Normanby) a request that he would appoint Mr. J. N. Wilson to a seat in the legislative council. At the time this advice was tendered, a vote of want of confidence in ministers was pending in the house of representatives. Under these circumstances, the governor objected to make the appointment; unless it was proposed to confer ministerial office on Mr. Wilson (which appears not to have been the case): but he declared that, in the event of the ministry being sustained on the confidence motion, he would readily consent to the application.

Governor Normanby on appointing legislative councilors.

The governor's memorandum on this subject was, on the advice of ministers, laid upon the table of the house. Whereupon, on November 5, the house agreed to a resolution censuring his excellency for 'noticing a matter in agitation or debate in the house, as a reason for refusing to accede to advice tendered by his ministers.' Certain of the ministry voted in favour of this resolution, which was directed to be transmitted to the governor by an address.

Meanwhile, on November 6, the vote of want of confidence was negatived, but only by the casting vote of the speaker.ⁱ Whereupon the governor, as he had promised, summoned Mr. Wilson to a seat in the legislative council.

Upon his receipt of the address above mentioned, transmitting to him the vote of censure, the governor forwarded the same to his ministers. He then sent a message to the house, stating that, as soon as he had been advised what reply to make to this communication, he would notify the same to the house. But the ministry refused to interpose on the governor's behalf. His excellency demurred to this conduct, and referred them to the constitutional rule that 'it is the government, and not the governor, who must, so long as they remain his advisers, be solely responsible to parliament for his acts.' He pointed out that, if ministers were not prepared to accept and defend a particular act of the governor, it was their duty to resign, and thus afford the governor an opportunity of forming a ministry who would sustain him; leaving it to the governor to

^h Tasmania Leg. Coun. Jour. 1877, Sess. 4, App. No. 11, p. 13.

ⁱ See *post*, p. 776.

Governor's interposition in local questions.

justify his own course to the Imperial government, to which alone he is personally responsible. The ministry, however, adhered to their view that the governor was to blame, on the abstract question of refusing to take their advice in respect to a nomination to the legislative council, because a vote of censure was under discussion. Neither would they admit their own responsibility for the governor's actions to the full extent of the rule above cited. Accordingly, the governor announced his intention of submitting the question to the secretary of state for the colonies, and of transmitting the whole correspondence to the local parliament.^j

No further action was taken by the New Zealand legislature upon this case. But, in a despatch dated January 15, 1878, the governor was informed that his conduct in this occurrence was entirely approved by her Majesty's government.^k

Governor Normanby assents to a bill against advice of ministers.

In December, 1877, the premier of New Zealand (Sir G. Grey) advised the governor to refuse the royal assent to a bill, intituled 'The land act,' which had been agreed to by both houses of the local parliament. This advice was given, because the bill had been introduced by the late government, though afterwards forwarded by the new ministry, but it had been amended, during its progress through parliament, in a manner objectionable to ministers. The governor demurred to the course proposed. He considered that ministers would have been entitled to oppose, to the extent of their ability, the passing of the bill; but he saw no reason why he should take the unusual course of vetoing the measure. Vexed at this refusal, the premier at first declined to attach his name to the formal certificate, recommending the governor to assent to it. Ultimately, however, he agreed to do so, and the bill was assented to. The secretary of state for the colonies, in a despatch dated February 15, 1878, approved of the action taken by the governor upon this occasion, in declining, under the circumstances he had explained, to refuse his assent to this bill.^l

On June 22, 1878, the Marquis of Normanby transmitted to the colonial secretary further correspondence between himself and Sir George Grey, on which he offered no opinion, but submitted it to the consideration of her Majesty's government.

In this correspondence Sir G. Grey complained of the governor

^j New Zealand Official Pap. 1877-78. Rusden, Hist. New Zealand, v. 3, p. 204.

^k New Zealand Official Gazette, June 21, 1878.

^l See the despatches in the supplement to New Zealand Gazette,

1878, p. 912. But if the governor had seen good to approve of the advice of his ministers, there was no constitutional reason why the royal assent should not have been withheld from this bill; see cases noted *ante*, pp. 169, 586.

for having taken the initiative in submitting to the secretary of state questions in dispute between his advisers and himself. The premier denied the right of the secretary of state to interfere in local matters, or even to express an opinion in respect to the proceedings or privileges of the general assembly, without the consent of that body. He assumed, moreover, that any such interference, though ostensibly emanating from the secretary of state, would actually proceed from his chief subordinate at the colonial office, and probably be instigated by certain returned colonists, now resident in England, to the prejudice of the best interests of the colony. In his reply, Governor Normanby justified his conduct on the ground of his responsibility to the Crown through the secretary of state, and claimed that, under the constitution act, he as the Queen's representative was as vital a part of the constitution as either branch of the legislature, and had rights and duties to perform which he was bound to maintain unimpaired. In rejoinder, Sir G. Grey insisted that the governor was responsible to the law, not merely to an Imperial officer; and that, inasmuch as the local constitution act permits of the governor's office being made elective, he ought always to act in a manner consonant with such a position.^m

Governor's interposition in local questions.

The secretary of state for the colonies, in a despatch dated September 1, 1878, expresses his approval of the course taken by Lord Normanby in reference to the aforesaid correspondence, and justifies his own practice in the disposal of business at the colonial office. He also declared that in the event of the office of governor becoming elective, the express reservation in section 57 of the constitution act (15 & 16 Vic. c. 72) of the Queen's right to instruct the governor in regard to his powers of giving or withholding the assent of the Crown to provincial legislation, would sufficiently control the general assembly in the exercise of their constitutional functions.ⁿ

The following cases, illustrating the true position of a lieutenant-governor, and the proper limits of his office, as representing the authority of the Crown in the provincial constitutions, have occurred in the dominion of Canada :—

In 1878, Lieutenant-Governor Letellier, of the province of Quebec, dismissed his ministry, because in his judgment they had failed to recognise the deference due to his office, and had recommended certain measures to the consideration of the local legislature

Lieutenant-Governor Letellier dismisses his ministry.

^m N. Zealand H. Jour. 1878, App. A. 1, pp. 19-27.

ⁿ *Ib.* 1880, App. A. 2, p. 2.

of which he had not approved. At the time of their dismissal, this ministry were able to command a majority in the assembly of twenty in a house consisting of sixty-five members. When their successors were appointed, the governor was advised to dissolve the legislature. The result of an appeal to the constituencies was, that the new ministry were sustained in the new assembly by a bare majority, sufficient to enable them to carry on the government.^o

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The next case of the dismissal of a ministry, occurring in the same province, was brought about through an investigation held before the senate of the dominion of Canada in the *Baie des Chaleurs* matter.

In the session of 1891, a bill from the house of commons was introduced into the senate, entitled 'An act respecting the Baie des Chaleurs railway company.' The purpose of the bill was to confer upon this railway company a federal charter, and so bring it within the jurisdiction of the parliament of Canada, it having been incorporated in 1882 under a provincial statute by the Quebec legislature. Under its original charter the company was authorised to build a line from some point on the Intercolonial railway in the vicinity of the Restigouche river, to New Carlisle, or Paspebiac bay.

Sixty miles of this road was about constructed, when, in the year 1889, the sub-contractor, unable to obtain payment for his work—though moneys for the same had been drawn from the government subsidy by the railway company, as the construction progressed—suspended payment, executed an abandonment of his property and put the case into court.

In the following year an act was passed by the Quebec legislature empowering the lieutenant-governor, on a report of the railway committee of the executive council, to cancel the charter of any pro-

^o See *ante*, pp. 601-620. See Reform Association of Toronto, in
 *x-Governor Letellier's letter to the the 'Toronto Globe' of Oct. 3, 1879.

vincial railway company that had failed to comply with the terms of its charter, or through insolvency, or for any cause which appeared sufficient to justify such cancellation. This act, it had been alleged, was passed with the object of annulling the charter of the Baie des Chaleurs railway, thus ostensibly affording an opportunity for completing its construction by a new company.

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In the same session, 1890, an act was passed by the legislature granting a sum of \$50,000, likewise a land-grant, not to exceed in all 800,000 acres, as subsidies to the completion of this line.

In April 1891, an offer to construct the road was made to the government, which contemplated the reorganisation of the company, conditional on the balance of past subsidies being paid—amounting to \$260,000, together with the two subsidies mentioned in the afore-named act; only that the 800,000 acres be converted into money, the same to be held by the government to pay the legitimate and privileged claims then existing against the road through the old company.

This offer the Quebec government accepted, by order in council dated April 21, 1891, conditional on the Baie des Chaleurs railway company being reorganised; but in consenting to the conversion of the land subsidy into money, the wording of the order in council ran, 'which subsidy shall be kept by the government and employed by it to pay the *actual* debts of the Baie des Chaleurs railway,' whereas by 54 Vic. c. 88, sec. 1, sub-sec. J., the government was only empowered to use such moneys for *privileged* debts.

The alleged reorganised company sought, as already noticed, a federal charter, on the ground of the general advantage of the road to Canada and that the

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company might be freed from past associations, as a better guarantee for the disposal of its bonds.

At this stage of the proceedings, creditors of the insolvent estate of the sub-contractor—before mentioned—appeared before the senate committee seeking an amendment to a certain clause in the Baie des Chaleurs railway bill, alleging as a reason for so doing, ‘that without such amendment their rights would be seriously impaired, inasmuch as there was reason to suspect the good faith of the company with respect to their proceedings to obtain provisional possession and use of the said portion of the railway; that the dealings of the reorganised company under the provisions of the acts of the legislature of the province of Quebec and the orders in council of the government of Quebec, above referred to, cast suspicions upon the intentions of the company with respect to the privileged and other creditors; that the lien alleged to be claimed by Henry Macfarlane (sub-contractor) is a *bonâ fide* and existing lien; that attempts have been made by the company to oust the legal representatives of Henry Macfarlane from their possession of the said portion of the railway; and that the unrestricted right to issue bonds would, in consequence of the priority given to such bonds by “The railway act,” render worthless the security afforded by the said lien.’^p

The matter was accordingly referred to a select committee of the senate for investigation. Upon this, the promoters of the bill sought to withdraw it, but leave was not granted, so the committee proceeded to examine into the charges.

The evidence showed that out of certain moneys amounting to \$280,000, being a portion of government

^p Report of Select Committee, Senate, *re* Baie des Chaleurs Ry. Co. 1891, pp. iv.-v.

subsidies, a certain sum of \$175,000 (\$100,000 of which was payment to one Pacaud, for acting as a go-between the contractor and the government) had been improperly diverted to purposes other than the construction and completion of the railway, through dealings of the contractor with officials of the government and a commissioner, the latter an appointee of the Quebec government to settle the claims and debts due in respect of the railway from the subsidy grants. Moreover, this gross misapplication of public money appeared to compromise members of the Quebec cabinet.

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Meanwhile the lieutenant-governor had lost no time in demanding an explanation from his first minister, the Hon. H. Mercier, as to these alleged irregularities. Under date of September 7, 1891, his honour wrote the premier, reciting various utterances that he (Mr. Mercier) had made in the local legislature whenever the question of voting more subsidies to this railway came before the house, which showed the discreditable financial condition of the road. He referred to certain interviews that the then acting premier (Mr. Garneau) had had with him, wherein the minister complained of pressure having been put upon him in the matter under discussion, of the payment of subsidies to the Baie des Chaleurs railway. He drew his attention to the damaging evidence made before the senate railway committee, from which he quoted, pointing out the most salient items that caused him apprehension. His honour specially referred to the illegal manner in which the government had drawn from the treasury the sum of \$175,000, by means of letters of credit that had not had the sanction of the representative of the Crown. Again, without similar sanction, the prejudicial manner in which the mode of binding the finances of the province had been adopted, to the detriment of the public

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credit, notably in the instance of the banks refusal to discount the government letter of credit for \$100,000 without collateral security. He asserted that the government when paying \$175,000 to a Mr. Armstrong, contractor, made that payment to a person to whom they owed nothing, and to whom the railway company merely owed debentures. This sum, drawn from government subsidies, was only payable—by statute 54 Vic. c. 88, par. J,—for privileged debts and further construction of the railway; the pretensions of Mr. Armstrong coming under neither of these categories. Further, that the sum of \$100,000 paid to Mr. Pacaud deprived the railway enterprise of that much of the subsidy voted by the legislature.

His honour concluded by saying :—‘ There would seem to exist between the government and the creditors of the province a barrier at which tribute is levied before justice is done to claimants.

‘ Under these circumstances it becomes my duty :—

‘ 1. To require explanations on this matter of the Baie des Chaleurs railway.

‘ 2. To request your concurrence in the appointment of a royal commission consisting of three judges, authorised to hold an investigation, and to report upon the facts and circumstances which preceded, accompanied, induced, and followed transactions entered into under the act 54 Vic. c. 88, in so far as it relates to the Baie des Chaleurs railway company. I suggest that this commission be composed of the Hon. Mr. L. A. Jetté, judge of the superior court ; Hon. Mr. L. F. G. Baby, judge of the court of Queen’s Bench ; and the Hon. Mr. C. P. Davidson, judge of the superior court.

‘ Until further orders I require you also to limit the action of the government to acts of urgent administration, and I revoke the appointment of the deputy-lieutenant-governor made under the treasury act, to

sign warrants on the consolidated revenue fund, under article 765 of the revised statutes of the province of Quebec, and I pray you to give notice of such revocation to whom it may concern.' Baie des Chaleurs railway case.

The premier replied at length explaining away all apparent irregularities; maintained, without fear of contradiction, that the action of the government in its dealings in the matter had been perfectly honourable, entirely in the public interest; and that nothing had occurred to directly or indirectly give rise to suspicions as to the proper character of the transactions throughout.

With reference to the commission of inquiry, Mr. Mercier at the outset claimed preference for investigation through a committee of the legislature. But this not being granted—owing to an apprehension on the part of the lieutenant-governor that some of the premier's supporters in the house were implicated in the alleged irregularities—he advised that the commission consist of but one judge. This proposition his honour declined to accept, so Mr. Mercier eventually agreed to the commission of three, and a proclamation was accordingly issued, dated the 21st September, 1891.

At this stage of the proceedings the lieutenant-governor wrote informing Lord Stanley, the governor-general, that the gravity of the situation prompted him to forward the correspondence for the information of his excellency, as to the line of action he had felt constrained to take towards his advisers.^a

The sittings of the commission were held at Quebec, beginning on the 6th of October, and lasted till the 7th of November. The evidence developed new and startling facts.

Through the serious illness of Mr. Justice Jetté the joint deliberations of the commission, on the findings of the evidence, were suspended; but, before issuing

^a Correspondence laid before the Senate, Sess. Pap. 1891, Nos. 86, 86a.

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their final report, Judges Baby and Davidson deemed it advisable to present an interim report, dated 15th of December, 1891, in which they gave a summary of certain matured opinions on some leading features of the inquiry, the gist of which was—

That E. Pacaud acted as an intermediary between the government and the contractor, C. N. Armstrong.

That the bargain made between Armstrong and Pacaud, by which the sum of \$100,000 was promised and paid to Pacaud, was fraudulent, and an audacious exploitation of the provincial treasury.

That Armstrong's claim was not due, and therefore not exigible.

That the provincial secretary, the Hon. C. Langelier, from time to time received sums of money from Pacaud amounting to over \$9,000, and in the light of facts seemed to be aware of the source from which Pacaud obtained them.

That 'notes amounting in all to \$23,000 discounted for political purposes were paid by Mr. Pacaud out of Baie des Chaleurs money. This debt, as shown by the testimony of Mr. Mercier, had been contracted with the formal understanding that the responsibility, as between the signers and endorsers, should be equally borne without regard to the order in which the signatures or endorsements appeared. Mr. Pacaud's payment of these notes, although apparently without the knowledge or consent of the several debtors, none the less as to each of them effected the extinction of a personal debt; and when, later on, this payment became known, it was not disavowed by those for whose benefit it was so made. Messrs. Mercier and Charles Langelier were among the endorsers.'

That a contradiction appeared between Mr. Mercier's explanation to the lieutenant-governor, as reported in official correspondence, and the testimony before the

commission regarding \$5,000 sent by Mr. Pacaud to Mr. Mercier, while the latter was in Europe.

Baie des
Chaleurs
railway
case.

That it was not proven that Mr. Mercier was aware of the Armstrong-Pacaud bargain.

The full report of the commission was made on the 8th of February, 1892, and appeared as a majority and minority report, the former signed by Honourable Justices Baby and Davidson, the latter being the opinions of Mr. Justice Jetté.^r

The majority report reviews thoroughly every phase of the fraudulent transaction in connection with the Armstrong claim and the issue by government of the two letters of credit, for \$100,000 and \$75,000, to meet the same; likewise the improper disposal of these moneys. But, without following the details of this nefarious transaction, it will be sufficient to notice in how far the report implicates ministers of the Quebec cabinet.

Of the premier, the Hon. Mr. Mercier, it says :—

‘That a draft of \$5,000 was remitted by Mr. Pacaud to Mr. Mercier in Europe on the 15th May, the funds thereof taken out of the \$100,000.

‘That a second draft for the same amount was remitted by Mr. Pacaud to Mr. Mercier, the funds for which were, according to Mr. Mercier’s instructions, to be procured by the discount of a blank note of his endorsation; but that Mr. Pacaud used certain funds coming to him from a source not disclosed in evidence, and a month afterwards put to his own credit the proceeds of a note for \$6,000, filled up on the blank on which was Mr. Mercier’s endorsement.

‘That during Mr. Mercier’s absence Mr. Pacaud made payments for him amounting to \$1,788.29, taken out of the \$100,000.

^r Report of the Royal Commission, 8vo, Quebec, 1892.

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case.

‘That Mr. Mercier was an endorser, with others, on promissory notes made by Mr. Pacaud amounting to \$23,000, where an understanding existed that the endorsers were, as between themselves, equally responsible, irrespective of the order of signatures; the notes were discounted for political purposes and paid by Mr. Pacaud out of the \$100,000.

‘That if these payments were made by Mr. Pacaud apparently without the knowledge of Mr. Mercier, they none the less operated the discharge of a debt personal to the latter, and when Mr. Mercier became aware of their existence he did not repudiate or seek to relieve himself of them.’

In referring to the incidents connected with Armstrong’s illegal claim, by which these large sums of money were paid out of the public treasury, the report says :—

Great pressure had been put upon Mr. Garneau to induce the passage of the order in council and the issue of the letters of credit. Those who urged him by speech and letter, or either one or the other, were his fellow ministers the Hons. C. Langelier, Robidoux, and Duhamel. Again : Armstrong considered it necessary to act as he did because of Pacaud’s peculiar position towards and influence with the provincial minister.*

Of the commissioner of public works, the Hon. P. Garneau, the report says :—

Without pronouncing on the legality of the assumed conversion into money of the land subsidy or of the advances as made, we find, on the facts disclosed, that the whole transaction was conducted with singular precipitation, and that Mr. Garneau did not adopt the precautions to guard against eventualities which prudence, either from a business or legal point of view, dictated. The issue of letters of credit to close the transaction instead of waiting for regular supplies from the provincial treasury was irregular. But it adds that he acted in good faith, and only succumbed to pressure of

* Report of the Royal Commission, 8vo. Quebec, 1892, pp. 40, 58.

which he complained, but was not strong enough to resist. He did not in any wise benefit by the transaction.^t

Baie des
Chaleurs
railway
case.

Of the attorney-general, the Hon. J. E. Robidoux, the report says:—

That in the latter part of May, 1891, Mr. Robidoux offered to attempt the discount at Montreal of Mr. Pacaud's note endorsed by Mr. P. Valliere, to which was attached one of J. C. Langelier's official cheques for \$20,000, and a letter from Mr. Webb to Mr. Bousquet (cashiers respectively of the Union Bank and Banque du Peuple), promising to honour the cheque when the government paid its letters of credit for \$100,000.

That he thereupon received the securities from Mr. Pacaud, to whom, after an unsuccessful effort, he in a few days returned them, and that in view of his knowledge and support of the negotiations, contract, and letters of credit, and of Mr. Pacaud's connection therewith, the offer to discount, possession, and attempted discount of the note, with its attached securities, were acts of a highly compromising character. But that there was no evidence that he in anywise benefited by the Armstrong-Pacaud bargain.^u

Of the provincial secretary, the Hon. C. Langelier, the report says:—

That Mr. Charles Langelier had knowledge of the source whence came the funds out of which Mr. Pacaud paid to him about \$9,000 for his personal benefit.

That he was an endorser with others on five promissory notes made by Mr. Pacaud amounting to \$23,000; that an understanding existed whereby the endorsers were, as between themselves, equally responsible without reference to the order of signatures; that the notes were discounted for political purposes, and that they were paid by Mr. Pacaud out of the \$100,000.

That he was the maker of and consequently personally responsible for a note of \$2,000, also made for political purposes and paid out of the \$100,000.

And that he never repudiated or sought to discharge himself of the payments of these notes as so made.^v

The report also gave a list of members of the legislature who had been recipients of certain sums of

^t Report of the Royal Commission, 8vo. Quebec, 1892, p. 101.

^u *Ib.* p. 137.

^v *Ib.* p. 138.

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Chaleurs
railway
case.

money from Pacaud, but stated that they were severally ignorant that the payments had come from the \$100,000.

The minority report arrives at a different conclusion as regards complicity of ministers. Mr. Justice Jetté's general summing up finds that :—

First, The Pacaud-Armstrong agreement is proved and even admitted, but it was kept secret between Messrs. Armstrong and Pacaud, and neither Mr. Thom nor Mr. Cooper knew anything about it.

Secondly, There is no proof that any of the ministers knew of this agreement prior to the revelations made before the committee of the senate.

Thirdly, None of the ministers, except Mr. Charles Langelier, profited in any way from Mr. Armstrong's money.

Fourthly, Mr. Langelier does not seem to have known the source of the money that he received from Mr. Pacaud.*

The lieutenant-governor of Quebec did not, however, wait for the full report of the commission, but took prompt action on the interim report which he had received on December 16, and wrote the Hon. Mr. Mercier on that date informing him of its receipt and contents.

In his letter he asserted that the premier's statements made in the ministerial explanations—to the effect that the government's actions had been perfectly honourable throughout ; executed in the public interests ; and that nothing in the transactions had occurred in any way to give rise to suspicions as regards the ministry—had lost their value in the face of the report. He reviewed the careless and illegal actions of his ministry throughout the transactions of the Baie des Chaleurs affair, as set forth in the report, and noted that contradictions existed between the evidence before the commission and the ministerial explanations ; also the silence of those explanations touch-

* Report of the Royal Commission, 8vo. Quebec, 1892, p. 191.

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Chaleurs
railway
case.

ing certain facts of extreme gravity personal to some of the ministry, all of which led him to the conclusion 'that the ministry is not in a position to advise the representative of the Crown wisely, disinterestedly, and faithfully.' He concluded by saying that notwithstanding these revelations, and the persistency of the ministry to remain in office, 'there only remains for me, under the circumstances, in order to protect the dignity of the Crown and to safeguard the honour and interests of the province in danger, the constitutional remedy of withdrawing from you my confidence, and to relieve you and your colleagues from your functions as advisers of the representative of the Crown and members of the executive council.'

On the following day Mr. Mercier wrote stating that he was assured that his honour had received a special letter from Judge Jetté relative to the report, a copy of which he requested to have ; and assumed that there would be no objection to his publishing the same, together with the letter of dismissal of the cabinet. To this his honour replied that he considered the letter in question as personal, and that he could not permit the publication of his despatch of yesterday without violating constitutional law and usage, which required that the publication of state documents could only be made on the responsibility of the advisers of the Crown.

Upon the receipt of this the ex-premier wrote the lieutenant-governor a threatening and abusive letter, in which he claimed that 'I consider myself justified in doing without your permission, and in publishing your letters of yesterday and to-day, as well as my own.'^x This he accordingly did, regardless of the lieutenant-governor's

^x Letter from Lt.-Gov. Angers Ministry, laid before the Senate, to the Governor-General, forwarding Sess. Pap. 1892. correspondence of dismissal of his

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Chaleurs
railway
case.

injunction.^y Constitutional usage makes it contrary to the respect due to parliament to communicate beforehand, to the public through the press, important information intended for the use of parliament.^z

At the request of the lieutenant-governor, the Hon. C. E. B. de Boucherville, legislative councillor, assumed the task of forming a new ministry. After the ministry had been formed and sworn, they tendered their advice to the lieutenant-governor to dissolve the legislature and appeal to the people.

By the 86th sec. of the B. N. A. act the legislature of the province must be convened once in every year; but legislation for 1891 in the province of Quebec was a blank. The development of the Baie des Chaleurs matter, and the consequent appointment and sitting of a royal commission of inquiry into the conduct of ministers, until the presentation of an interim report on the 15th December, covered the usual period when a session would otherwise have been held. The lieutenant-governor, in dismissing his ministry within a couple of weeks of the expiration of the year, considered the exercise of the prerogative of dissolution of primary importance to that of convening the legislature.

Aside from this question, the report of the commission having implicated some of the members of the legislature, supporters of the dismissed ministry, the lieutenant-governor did not evidently think that body a fit tribunal to pass judgment upon the innocence or guilt of the ministry; and considered that the country should alike be given the opportunity to expurgate the element of corruption by changing the personnel of the assembly.

^y In 'L'Electeur' newspaper of Quebec, Dec. 18, 1891.

^z Todd, Parl. Govt. in England, new ed. v. 1, p. 442.

Baie des
Chaleurs
railway
case.

On December 23, 1891, the De Boucherville ministry was gazetted to office, and a proclamation issued dissolving the legislative assembly, making the writs returnable on March 15, 1892.^a

The result sustained the action of Lieutenant-Governor Angers throughout by a complete victory for the new ministry, over two-thirds of the house having been returned as its supporters.^b

The foregoing precedents will suffice to establish the doctrine contended for elsewhere in this treatise,^c that, wherever parliamentary institutions are established and the system of ministerial responsibility prevails, the executive officer specially charged with representing the Crown in the particular colony or province — whether he be a governor-general, governor, or lieutenant-governor — must be regarded as possessing, within the prescribed limits of his rule and jurisdiction, as the head of a self-governing community, substantially the same privileges and functions that pertain to the sovereign in the British constitution.

Nay more, it may be safely asserted that the direct power of a constitutional governor in the colony over which he presides is practically greater than that of the sovereign in the mother country, inasmuch as a governor is personally responsible to a higher authority for the maintenance of the royal prerogatives, and for administering his government in accordance with the instructions he has received from the Imperial Crown. A governor, like every other agent, has a double relation: first, to his principal; and, secondly, to the party with whom he transacts the affairs of his principal; ^d and

Constitutional
powers of
a governor.

^a Quebec Official Gazette, 1891, many supporters.
p. 2823.

^b Before the election Mr. Mercier had a majority of twenty-five in the House, after it he had not that

^c See *ante*, p. 32, *et seq.*

^d Hearn, Govt. of England, p. 129. See the remarks of Governor Mulgrave, of Nova Scotia, on this

every statesman conversant with colonial politics is aware that in a colony very many occasions will arise where the prerogative of the Crown would need to be exercised under circumstances which would not necessitate, and perhaps would not justify, a similar procedure in England. Striking examples of this fact will be apparent when we review the constitutional rights of a governor in the exercise of the prerogative of dissolution.

Beneficial
exercise of
a gover-
nor's
powers.

The lawful authority of the Crown in connection with parliamentary government—though apt to be disregarded by theoretical politicians, and subject to be weakened by the increasing prevalence of democratic ideas—is essential to the efficiency and stability of parliamentary institutions. Such authority, when constitutionally exercised, is calculated to be especially beneficial in colonies where Imperial interference with the rights of local self-government has been reduced to a minimum, for it then becomes the sole expression of the monarchical principle in the colonial polity.*

The framers of the American constitution deemed it necessary, in the interest of the nation, to entrust large powers to the president, including a right to veto the legislation of congress, unless, upon reconsideration, two-thirds of both houses should require the passing of a measure of which the president had disapproved.

point, in a despatch to the colonial secretary, dated June 23, 1860; in *Nova Scotia Assem. Jour.* 1861, App. No. 2, p. 5. See also Lord Carnarvon's circular despatch to Australian governors, of May 4, 1875. *Com. Pap.* 1875, v. 53, p. 696.

* See *ante*, p. 33. On July 1, 1863, the distinguished Canadian statesman, Thomas D'Arcy McGee, addressed a letter to the '*Montreal Gazette*,' pointing out to all who

wished to maintain British connection, and to save Canada from drifting into a democracy, the need of rallying in defence of the principle of 'the equal union of authority and liberty, hitherto found possible only under the forms of constitutional monarchy.' He appealed to every patriotic Canadian to 'manfully do his part towards conserving the monarchical principle in our constitution.'

In view of the more extended powers which are practically confided to a parliamentary ministry able to command a majority in the popular chamber, it is evident that some restraint upon their actions is needful to counteract possible corruption or abuse. This restraint is afforded by the vigilant oversight of the sovereign or her representative.

Whatever measures may be framed, whatever policy propounded, by a parliamentary ministry, must be subjected to the scrutiny and must obtain the approbation of the Crown. In a British colony, the representative of the Crown is usually a man of special qualifications for his exalted office. Necessarily impartial, and usually experienced in the science of government, the statesmen to whom such eminent functions are entrusted rarely fail to win the respect and confidence of the people as well as to merit the favour of their sovereign. For their powers are conferred upon them in trust for the welfare of the people, to whom in the last resort every governor must appeal, when in the discharge of his constitutional rights he dismisses an incompetent or unworthy ministry, or asks for a verdict to ratify or to disallow a decision of the popular assembly. This method affords the best security attainable in a parliamentary system against the injurious influences of party and the intrigues of faction, while it secures the ultimate triumph of the rights of self-government.

Governor's
powers
a trust for
the public
good.

CHAPTER XVII.

PART II.

THE CONSTITUTION AND POWERS OF COLONIAL PARLIAMENTS,
AND THE POSITION OF THE GOVERNOR IN RELATION TO
THE LEGISLATIVE CHAMBERS.

HAVING discussed the position and functions of a constitutional governor in relation to his ministers, and in view of the rights of local self-government conceded to colonies by the grant of parliamentary institutions, it remains to examine the lawful powers of a governor in relation to the local parliament, of which, by virtue of his office, he is a component part.

But we must first endeavour to ascertain what are the rightful powers and privileges of colonial legislative bodies, and what are the constitutional relations which the two legislative chambers should occupy towards each other.

Definition
of 'par-
liament.'

At the outset, it may be well to consider briefly the propriety of the term 'parliament,' as applied to a colonial legislature.

It has been urged, with more ingenuity than discrimination, that it is wrong in principle and contrary to Imperial practice to designate by this title any of the minor legislative bodies in existence throughout the empire, and that the appellation of 'parliament' should be exclusively reserved for the great council of the nation, and for those subordinate legislatures only which

(like the dominion parliament in Canada) might be invested with the title by Imperial enactment.^a

Local
legisla-
tures.

[Mr. J. S. Watson, in articles in the 'Canadian Monthly,' for November and December, 1879, on 'The Powers of Canadian Legislatures,' shows that the legislature in Upper and Lower Canada, antecedent to the union of the provinces in 1841, as well as the united legislature then incorporated, were officially termed 'provincial parliaments,' deriving their title to this appellation from the fact that they were not subordinate bodies with municipal functions, but were empowered to make general laws 'for the peace, welfare, and good government of the province.' But since confederation the dominion minister of justice has had occasion to remonstrate with several of the provincial governments for persisting in applying the term 'parliament' to their local legislatures, contrary to the express provisions of the British North America act of 1867.^b]

But this idea is founded on a fallacy, and is not warranted by Imperial usage.

Freeman, whose reputation as a constitutional writer ranks deservedly high, tells us that the word parliament signifies a colloquy or talk. The term appears in French in the twelfth century, and in Latin in the thirteenth. But it is merely a translation of the expression 'deep speech,' which according to the English chronicle, King William held with his witan in the eleventh century. The parliament of England is historically so called because it was assembled together to *parley*, to talk, to hold high converse on affairs of state with the king.^c

This derivation of the word would naturally incline us to describe by the name of parliament all legislatures in the British dominions which are substantially entrusted with independent powers of self-government.

Are all
legisla-
tures par-
liaments ?

^a Are Legislatures Parliaments ? pp. 310, 315, 318 ; *ib.* 1882, No. 141, a Study and Review. By Fennings pp. 8, 22, 25.

^c E. A. Freeman in N. Am. Rev.

^b Can. Sess. Pap. 1877, No. 89, v. 129, p. 159.

Are all
legisla-
tures
parlia-
ments?

For they, in their limited spheres of action, are as supreme as the Imperial parliament itself, and are directly occupied with the consideration of questions of general concern in the particular colony. Since the recognition of the rights of local self-government in the leading British colonies, the Imperial parliament, as we have seen,^d has refrained from all interference with the proper functions of colonial legislatures. These bodies are assembled, not merely to pass necessary laws for the good government of the colony, but also 'to hold high converse on affairs of state' with the representative of the Crown, to discuss and, by discussion, to influence the policy of the local administration upon all public matters affecting the welfare of the community. They are, therefore, as much entitled to be regarded as 'parliaments,' in and for their respective colonies, as the 'Imperial parliament' is in and for the whole empire.

It is different when a limited and inferior class of questions only are assigned to the exclusive legislative authority of a subordinate body, whilst the supreme control of state or general affairs is reserved to a superintending power. The functions of the one body, in such a case, are simply municipal and confined to a prescribed field of operation, whilst those of the other are national and comprehensive.

Subordi-
nate legis-
latures.

Such, in fact, is the relation borne by the legislatures of the different Canadian provinces towards the federal parliament of the dominion. The powers and jurisdiction of both are regulated by Imperial statute. To the former is delegated the exclusive right to make laws in regard 'to matters of a local or private nature' in each province. To the latter is assigned, not merely authority to legislate upon specified public matters affecting the public interests of the entire dominion,

^d See *ante*, p. 213.

but also to make laws upon whatever may concern 'the peace, order, and good government of Canada,' save only in matters of such exclusively local description as to be suitably reserved for provincial determination. The general powers conferred upon the federal legislature constitute that body as being emphatically and exclusively the 'parliament,' which 'holds high converse on affairs of state,' on whatever may affect the welfare of the Canadian dominion.

This distinction is justified by the terms employed in the British North America act. Therein the provincial legislative bodies are designated as 'legislatures,' and the dominion legislature is uniformly described as 'the parliament of Canada.'^e

But on turning our attention to colonial legislatures in other parts of the empire, and especially where the system of responsible government prevails, we find that from the period when local self-government was conceded to these colonies their legislatures immediately began to assume the appellation of parliaments, and that this claim received the sanction of the Crown.

Legislatures in self-governing colonies.

In Victoria (Australia), pursuant to the provisions of the Imperial act, 18 & 19 Vic. c. 55, which enabled the legislature to define, by statute, its own powers and privileges, an act was passed, in 1857, which declared that 'the legislature of Victoria shall be and is hereby designated "The parliament of Victoria."'^f

With or without express legislative authority, the appellation of parliament was likewise assumed by all other colonial legislatures in Australasia wherein local self-government had been introduced;^g and at a subsequent period by the 'parliament of the Cape Colony' in South Africa, pursuant to the local act, No. 1 of 1854.

^e See *ante*, p. 683, note.

^g See Queensland Const. Act,

^f Victoria Stats. 20 Vic. No. 1. 1867, sec. 41.

Are suit-
ably
termed
parlia-
ments.

This adoption of a title more dignified than that of legislature, and indicative of the possession of larger powers, was in no respect an act of usurpation or pretence. It was rather a reasonable and most constitutional assertion of an undeniable fact that more extensive powers had actually been conferred by the Crown upon the particular colony.

The propriety of this change of title has, moreover, been explicitly admitted by the Imperial government. Whilst in acts passed by the Imperial parliament referring to the acts and proceedings of colonial legislatures, the formal distinction between the 'legislature' of a colony and the 'parliament' of the mother country is still maintained,^h not merely to prevent confusion, but as an appropriate assertion of the abstract right of general legislation for the empire which necessarily belongs to the Imperial parliament, this difference is not observed in other official documents. A cursory examination of the despatches addressed by her Majesty's secretary of state to colonial governors, under the parliamentary system, will suffice to show that the local legislatures are usually, if not invariably, referred to therein under the name of parliament.

If the distinction herein noted between legislative bodies which continue to occupy a subordinate and dependent relation to the Imperial authority (or, as the case may be, to authority vested in a federal government) and those which have been entrusted independently with general powers of self-government, be correct, the appellation of 'parliament' to the legislative institutions in self-governing colonies is not merely allowable, but peculiarly appropriate, as marking an

^h Although in the marginal notes to the Canada Reunion Act, 3 & 4 Vict. c. 35, secs. 30 and 31, and to the New South Wales Constitution

Act, 18 & 19 Vic. c. 54, schedule, sec. 1, the term 'parliament' is applied to these colonial legislatures.

epoch in the constitutional progress of the colony, and as an evidence that, with the direct consent of the Crown, the right to legislate, in all matters of local concern, has been virtually surrendered to the local government.

Another question presents itself for our consideration in this connection, and one which is of great practical importance ; namely, the extent of the powers and privileges that may be rightfully assumed by a colonial legislature.

Powers
and
privileges
of local
legisla-
tures.

The answer to this question depends, in no small degree, upon the actual status of the legislative body itself. It may be suitably determined by the mutual agreement of the several branches or estates of the legislature in a formal statute. But if no higher warrant can be shown in favour of an alleged privilege than the assertion of a single branch of the local legislature, on its own behalf, the courts of law will interpose, and limit the claim in accordance with general principles of constitutional law applicable to the case. This has been repeatedly done by colonial courts, and, in the last resort, by the judicial committee of the privy council.¹

Whilst a colony is in a state of pupillage, and is directly subject to the control of the Crown, it is unnecessary and unbecoming in either branch of the local legislature to insist, for itself collectively, or for its members individually, upon the right to any privileges or powers except such as are indispensably necessary for the efficient performance of its proper functions. But when the status of a colony is raised to that of a self-governing autonomy—whether its jurisdiction includes the right of general legislation, or is limited to

¹ See cases cited in Forsyth's p. 189; and *Doyle v. Falconer*, Constitutional Law, p. 25; in Clarke, Law Rep. P. C. App. v. 1, p. 328. Criminal Law of Canada, ed. 1882,

Powers of
colonial
legisla-
tures.

the control and disposition of local questions of minor import, so long as the legislative powers exercised are exclusive and supreme^j—it becomes desirable to clothe the legislative body with greater authority. Such legislatures will need to possess inquisitorial powers, to secure themselves from obstruction. They will need coercive powers to enforce every lawful discharge of their appropriate functions, and to vindicate their proceedings from resistance or contempt. But in order to define with precision, and without excess, the powers proper to be conferred upon any legislative body, recourse should be had to statutory enactment. No acts can be passed in any colony except by consent of the Crown. The Crown, therefore, is able to judge what powers and privileges ought to be granted in each particular case, and is in a position to refuse its sanction to all unjustifiable claims. So long as an assertion of privilege is based upon analogy or inference merely, it is liable to exaggeration. But when privilege is defined by law, there is a restraint upon its abuse. This method has accordingly been approved by the Imperial parliament, by a general statute, as well as by special legislation, to explain or amend particular colonial constitutions.

Should be
defined by
statute.

Thus, by an Imperial act passed in 1865, it is declared that ‘every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature,’ provided that such laws have been duly enacted, pursuant to their constitution for the time being.^k

The principle of defining by statute the powers,

^j As in the case of several provinces in the dominion of Canada; see *ante*, p. 525.

^k 28 & 29 Vic. c. 63, sec. 5.

privileges, and immunities, to be possessed and enjoyed by local legislatures and by their individual members, had been previously introduced into certain colonies by Imperial authority. By the thirty-fifth section of the act 18 & 19 Vic. c. 55, it was declared that it shall be lawful for the legislature of Victoria (Australia) by legislation to define the privileges, immunities, and powers of the council and assembly of that colony, and of the members thereof; provided that the same shall not exceed those now held and exercised by the commons house of parliament or the members thereof.

Powers of
colonial
legis-
latures.

This act, to establish the constitution of Victoria, was passed in the colony in 1854 under the authority of the Imperial act, 13 & 14 Vic. c. 59, which empowered the several Australian colonies to frame their own constitutions. It was reserved for the pleasure of the Crown, and, as it contained provisions to which her Majesty was not competent to assent without the authority of parliament, it was submitted to parliamentary consideration, amended in certain particulars, and appended as a schedule to the act sanctioning and amending it. So that it actually forms part of the Imperial statute 18 & 19 Vic. c. 55.

Accordingly, in 1857, the legislature of Victoria passed an act, which was sanctioned by the Crown, to confer upon their two chambers, and upon the committees and individual members composing the same, the powers and privileges appertaining to the Imperial house of commons.¹

As in
Victoria.

The British North America act, 1867, section 18 (explained by the act 38 & 39 Vic. c. 38), contains a similar provision empowering the parliament of Canada to define by statute the powers, privileges, and immunities of the senate and house of commons, and of the members thereof respectively; provided only

¹ Victoria Stats. 20 Vic. No. 1. p. 487; Speaker of Victoria Assy. For decisions under this act see *v. Glass*, *ib. v. 7*, p. 449. *Dill v. Murphy*, 1 Moore P. C. N.S.

Powers of
colonial
legis-
latures.

In
Canada.

that the same shall not exceed those held, enjoyed, and exercised by the Imperial house of commons.

Pursuant to this authority, the Canadian act, 31 Vic. c. 23, was passed by the dominion parliament.

As in the case of the oaths bill, which was assented to by the governor-general under the authority of this statute, but was afterwards disallowed by the Crown upon the ground that it proposed to confer powers in excess of the powers exercised by the house of commons itself, at the time the Imperial law was enacted.^m

In Tas-
mania.

In the colony of Tasmania, however, the local legislature, in 1858, passed an act 'to confer certain powers and privileges on the houses of the parliament of Tasmania.' No previous authority had been given by the Imperial parliament for such legislation, other than the general power granted to the several Australian colonies by the Imperial act 13 & 14 Vic. c. 59, s. 32, to alter and amend their respective constitutions. This would justify the inference of the Canadian supreme court—as hereinafter mentioned—that any legislative body is competent, with the consent of the Crown, to pass an act to define its own powers and privileges.ⁿ

Privileges
restrained
when not
conferred
by statute.

In 1874 the house of assembly of Nova Scotia adopted certain proceedings in dealing with a refractory member of their body, whom they had resolved to have been guilty of a breach of privilege. They had adjudged him to have committed a contempt of the authority of the house, though he had not obstructed the public business, and had directed his forcible removal from the house until he should apologise for his conduct. Whereupon he brought an action of trespass for assault against the speaker and certain members of the house, and obtained in the supreme court of the province a verdict of damages. In 1877 the case was brought

^m *Ante*, p. 179.

ⁿ And see Forsyth, Const. Law, p. 26.

on appeal before the supreme court of the dominion. In January, 1878, judgment was rendered by Sir W. B. Richards, chief-justice of the court, and by the other learned judges present. They all agreed in affirming the judgment of the court below, and in dismissing the appeal. The effect of this decision was to declare 'that the house of assembly of Nova Scotia has no power to punish for any offence not an immediate obstruction to the due course of its proceedings and the proper exercise of its functions, such power not being an essential attribute nor essentially necessary for the exercise of its functions by a local legislature, and not belonging to it as a necessary or legal incident; and that, *without prescription or statute*, local legislatures have not the privileges which belong to the house of commons of Great Britain by the *lex et consuetudo parliamenti*.'

Powers of
local
legis-
latures.

The chief-justice, however, adverted to the propriety of provincial legislation on this subject, and remarked that 'the legislatures of Ontario and Quebec seemed to have conferred on the house of assembly in these provinces extensive powers, to enable them effectually to exercise their high functions and discharge the important duties cast on them. It may be necessary still further to extend their powers. The legislatures of the other provinces will probably consider it desirable to take the same course, and in that way unmistakably place these tribunals in the position of dignity and power which it is desirable they should possess.'

This decision affirms the right of the legislatures in the several provinces of the Canadian dominion to confer upon themselves and upon their individual members by a statute—to be passed with the consent of the Crown (as expressed by the approval of the same by the governor-general of Canada in council)

Privileges
may be
defined by
statute.

^o Landers *et al.* v. D. B. Woodworth, Can. Sup. Ct. Rep. v. 2, pp. 153-215.

Powers of
local
legis-
lat ures.

—any powers and privileges which they may deem to be necessary for the efficient discharge of their constitutional functions. Such authority could be exercised either by virtue of their inherent power as legislative bodies (as in the case of Tasmania, above mentioned), or in pursuance of the ninety-second section of the British North America act, 1867, which authorises the legislature in each province to amend from time to time—‘notwithstanding anything in this act’—‘the constitution of the province, except as regards the office of lieutenant-governor.’^p

In Nova
Scotia.

Anticipating the suggestion of Chief-Justice Richards, the legislature of Nova Scotia in 1876, while the aforesaid action of *Landers et al v. Woodworth* was pending, passed an act respecting the legislature which conferred upon both houses, and upon the members thereof, the same privileges as shall for the time being be enjoyed by the senate and house of commons of Canada, their committees and members for the time being.^a The dominion minister of justice, in reporting upon this statute, drew attention to the fact that, in 1869, acts purporting to confer upon the legislatures of Ontario and Quebec similar powers had been objected to and disallowed. Again, in 1874, a Manitoba statute to the same effect was likewise disallowed. Subsequently, in 1870 and in 1876, these three provincial legislatures passed other acts to define their privileges and powers, which, though they appeared to be open to very serious question, and though it was considered doubtful whether they were not in excess of the jurisdiction and authority of a local legislature, yet they were left by the dominion government to their operation, upon the understanding that any person who might be aggrieved thereby could raise the question of their validity in a

^p *Landers et al. v. D. B. Wood-* 192, 201.
worth, Can. Sup. Ct. Rep. v. 2, pp.

^a N. S. Stats. 1876, c. 22.

court of law. But inasmuch as the Nova Scotia act of 1876 professed to confer upon the Nova Scotia legislative chambers powers which it had been decided by dominion authority should not be assumed by the legislatures of Ontario, Quebec, and Manitoba, the dominion minister of justice recommended that the objection should be brought under the notice of the lieutenant-governor, with a view to the repeal of the clauses to which exception had been taken, before the expiration of the time limited for the disallowance of the act.^r Nevertheless, it appears that this act was neither amended nor disallowed.^s

The principle asserted in the aforesaid judgment of the Canadian supreme court—which affirmed the right of provincial legislatures to confer upon themselves by statute whatever powers and privileges were deemed to be necessary—whilst it does not debar the Crown from interposing a veto upon an act which should attempt to legalise unwarrantable claims, does in fact render it difficult to object to any powers, proposed to be conferred by statute, upon a particular legislative body, that they were in excess of the powers which the supreme executive authority were disposed to approve. In this respect the court recognises the possession in provincial legislatures of a wider discretion than had been heretofore approved either by the dominion government or by the Crown law-officers in England ;^t and to this extent it confirms the position taken by the premier and attorney-general of Ontario (Mr. J. Sanfield Macdonald), when, in an able memorandum, he protested against the disallowance of the Ontario statute of 1869, defining the privileges, &c., of

Nova
Scotia
legis-
lature.

Principle
affirmed
by
supreme
court.

^r Canada Sess. Pap. 1877, No. 89, pp. 108–114, 201 ; Canada Gazette, v. 8, p. 262 ; Manitoba Stats. 1873, c. 2, 1876, c. 12.

^s Can. Sess. Pap. 1882, No. 141. p. 13 ; and see pp. 24, 50.

^t See *ante*, p. 523.

Powers of
local
legis-
latures.

the local assembly. This act had been disallowed, because it was presumed to be *ultra vires*, and inconsistent with the limitations of the British North America act; but, after a careful review of the argument, the attorney-general concludes with the pertinent remark that, in his opinion, 'sufficient consideration had not been given to the important distinction between powers claimed by the authority of a statute and powers claimed as inherently belonging to a legislative body.'^u

It is, however, quite possible for a colonial legislature to press this conclusion too far, and to advance claims to the possession of powers which no legislative body, whether colonial or Imperial, would be justified in assuming, and which could not be constitutionally conferred thereupon, even by statute, without detriment to the prerogative of the Crown. The only safe rule for a colonial legislature, in the definition of its powers and privileges, is never to attempt to exceed those possessed by the Imperial house of commons; whether or not any such restriction has been directly imposed by Imperial legislation.

In 1883 the colony of the Cape of Good Hope passed an act (No. 13) 'to define and declare the powers and privileges of parliament.' By section 7 of this act 'each house of parliament' was empowered to punish contempts 'by fine or fees and either'; whereas the Imperial house of commons has not claimed or exercised the power of imposing fines for upwards of two hundred years.^v

Thus in 1834 an act was passed by the legislature of Lower Canada, and assented to by the governor, to provide for the trial by a select committee of the assembly of controverted elections. This act, though

^u Canada Sess. Pap. 1877, No. 89, pp. 202-211, 221. And see S. Austral. Parl. Pap. 1877, No. 92, p. 6. The legality of the Quebec statute (33 Vic. c. 5) was established in the case of *ex parte Dansereau*; L. C. Jurist, v. 19, p. 210.
^v See May, Parl. Prac. ed. 1883, p. 114.

otherwise unobjectionable, contained a clause authorising committees to continue their investigations after prorogation. Now, the effect of a prorogation being to put an end to every proceeding pending in parliament—save only judicial business before the house of lords—and to vacate all orders of either house not fully executed,^w it is highly irregular and unconstitutional for a branch of the legislature to appoint a committee with liberty to sit during the recess after prorogation. Neither would it be consistent with the law and usage of parliament to sanction such a constitutional innovation by statute. The attention of the Imperial government having been drawn to this enactment, the governor was directed to bring it under the notice of the Lower Canada assembly as being an ‘interference with the right of the Crown to prorogue the parliament, and inconsistent with parliamentary law and usage’; and to advise the repeal of the clause so as to save the act from disallowance.^x The assembly readily passed a bill to remove this objectionable provision, but it was amended in the other house and the amendments failed to receive the concurrence of the assembly.^y The act of 1834 was, consequently, disallowed by his Majesty in council on July 6, 1836.

Powers of
local
legis-
latures.

Through ignorance of the principle which forbids such a proceeding, instances have occurred wherein certain colonial legislative chambers have given permission to their select committees to continue sitting after the prorogation of the local parliament.^z

The legislatures in the different British colonies wherein parliamentary government is established are, as a rule, composed of two chambers. The only ex-

Two legis-
lative
chambers.

^w Hats. Prec. v. 2, p. 335; Cushing, Lex Parl. sec. 917; May, Parl. Prac. ed. 1883, p. 49.

^x Lower Can. Assem. Jour. 1835–36, p. 227.

^y *Ib.* p. 427.

^z See N. Zealand Leg. Coun. Jour. Aug. 26, 1880; and *ib.* Sept. 8, 1882. N. Brunswick Leg. Coun. Jour. 1881, p. 101. But see Victoria Parl. Deb. v. 34, p. 31.

Canadian
local
legis-
latures.

ception is in certain of the provinces which are comprised in the dominion of Canada; but under the Canadian constitution the principal questions of public policy are reserved to the dominion parliament, and there is as yet no instance of a single chamber with full parliamentary powers in a British colony under responsible government.^a In view of the limited jurisdiction and functions of these legislative bodies, one chamber has been accounted sufficient for the purposes of legislation in the provinces of Ontario,^b Manitoba,^c British Columbia,^d and New Brunswick. In Quebec, Nova Scotia, Newfoundland, and Prince Edward Island the question of abolishing the second chamber has also been discussed; but, though the houses of assembly in all these provinces are decidedly in favour of such a modification of the existing constitution, the legislative councils have not, except in the case of Prince Edward Island, yet concurred in this opinion.

In the colony of Newfoundland—which is not included in the dominion of Canada—the legislative council is nominated by the Crown. But in 1881 a bill for the abolition of that chamber was passed by the assembly of the island.

In Nova Scotia in 1870 the refusal of the legislative council to concur in a proposal for the abolition of their chamber^e led the assembly to address the Queen for Imperial legislation to give effect to the wishes of the assembly in this particular.^f This occasioned correspondence between the dominion and Imperial governments.^g On April 12, 1881, no answer having been meanwhile communicated to the assembly to their address to the Crown, it was resolved

^a Com. Pap. 1882, v. 47, p. 369.

^b So provided by B. N. A. act, 1867, sec. 69, instead of the Two Houses in the old Upper Canada Legislature.

^c Upper house abolished by the Manitoba legislature, in 1876, subsequent to confederation, under the authority of the B. N. A. act, sec. 92 (1).

^d Legislative council under the old constitution, which included

elective and non-elective members, changed into a legislative assembly in 1871, before joining the dominion by a local act, passed under the authority of the Imperial act, 28 & 29 Vic. c 63, sec. 5.

^e N. S. Leg. Coun. Jour. 1879, pp. 46, 107.

^f N. S. Assem. Jour. 1879, p. 109.

^g N. S. Leg. Coun. Jour. 1880, p. 71.

by that house that the government be authorised, during recess, to correspond with the governments of the other maritime provinces with a view to concerted action for the abolition of the legislative councils of the several provinces of Nova Scotia, New Brunswick, and Prince Edward Island.^h In 1882 a legislative council abolition bill was introduced into the legislative council of Nova Scotia, but did not pass. Meanwhile the governments of the other maritime provinces had expressed their desire to see the abolition of their legislative councils effected by constitutional means; but the Imperial secretary of state had disapproved of immediate legislation on this question.ⁱ On March 17, 1883, the assembly of Nova Scotia resolved that it was expedient to abolish the upper chamber of the province 'as soon as can be done consistently with the existing laws and prerogatives of this legislature.' On this subject see note, *ante*, p. 576.

Canadian
local
legis-
latures.

In 1881 a bill to abolish the legislative council of New Brunswick was read a second time in the assembly of that province, but was afterwards dropped. Another bill to the same effect had previously passed the assembly, but was rejected in the upper house.^j In 1882 the subject was again discussed in the assembly, but on March 21 it was agreed to await some definite expression of policy thereon, on the part of the provincial administration. In 1883 the New Brunswick assembly passed a bill to authorise the taking of a vote of the electors, on the subject of vesting all legislative powers in the house of assembly, but the legislative council did not agree to it. In 1891, however, a bill was passed which abolished the upper chamber.

In Prince Edward Island bills to abolish the legislative council were passed by the house of assembly in 1879, 1880, and in 1882, but they were all rejected by the legislative council. In 1892 a bill was passed, but for some reason failed to receive the royal assent.

In small communities, and in provinces where the business of legislation is mainly of a municipal description, experience has shown that two chambers are cumbrous, and needlessly expensive.^k But, in colonies

^h N. S. Assem. Jour. 1881, p. 76.

ⁱ N. S. Leg. Coun. Jour. 1882, App. No. 12.

^j Leg. Coun. Jour. N. Brunswick, 1881, pp. 86-88, 94.

^k As in the case of the Leeward Islands, see Hans. Deb. v. 206, p. 1023. And see Mr. Kinnear's paper in favour of a single chamber, Fort. Rev. v. 6, N.S.

Advantages of a second chamber.

entrusted with the powers of local self-government, and where the policy of administration, as well as the making of general laws for the welfare and good government of all classes in the community, are under the control of a local legislature, a second chamber is a necessary institution.¹ It is a counterpoise to democratic ascendancy in the popular and most powerful assembly, it affords some protection against hasty and ill-considered legislation and action, and serves to elicit the sober second thought of the people, in contradistinction to the impulsive first thought of the lower house. These great benefits of a second chamber are in addition to the advantages derived from the revision and amendment of laws, which frequently pass through the assembly in a crude and defective state.^m Mr. E. A. Freeman is of opinion that, while a second chamber is always valuable in checking and revising the acts of the other house, it is especially indispensable in a federal system, because it is capable of representing therein the wants and wishes of the several states or provinces included in the confederation in their separate standing.ⁿ

In an article in the 'Victorian Review' (published at Melbourne) for April, 1880, Earl Grey contends for the abolition of the legislative council in the several Australian colonies, and for the introduction into the assembly of a limited number of 'life members,' to be chosen by the 'life,' and elected members of the house on the principle of the 'cumulative vote.' He also proposes to give to the governor (acting on ministerial advice) the right of suggest-

¹ See Todd, *Parl. Govt.* v. 1, p. 29, new ed. p. 39.

^m In addition to the authorities in favour of a second chamber, cited in the preceding reference, see Lecky in *N. Am. Rev.* v. 126, p. 71; Helps, *Thoughts on Government*, c. 4; Hearn, *Govt. of England*, p. 540; Fort. *Rev.* v. 20, N.S.; Bonamy Price in *Cont. Rev.* Dec. 1880, p. 942; Mr. E. A. Freeman, *ib.* Feb. 1883; Stockmar's *Memoirs*, v. 2, c.

28; *Hans. Deb.* on S. Africa confederation bill, April 23, 1877; Report of debates in *Parl. of Victoria* in 1878, on Reform of the Constitution; Speeches at a banquet in London to the premier of Queensland, on April 7, 1880; *The Colonies*, April 17.

ⁿ *Int. Rev.* v. 3, pp. 724, 741. In regard to the working of a second chamber in the American Republic, see *Am. Law Rev.* Oct. 1869, p. 18.

ing amendments to bills submitted to his consideration by the assembly. The selection of nominated members would, Lord Grey assumes, rest practically with ministers under 'responsible government,' and this would give them additional and much needed strength in the popular chamber.^o

Advantages of a second chamber.

Under parliamentary government, an upper chamber derives peculiar efficacy and importance from the fact of its independent position. Free from the trammels of party it is able to deliberate upon all public questions on their merits, unrestrained by political considerations, which are too apt to bias the judgment of every administration, in certain contingencies. For the same reason, an upper chamber, being unable to determine the fate of a ministry, is much less influenced by party combinations and intrigues than the popular assembly.^p This constitutes the special value of an upper house, under parliamentary institutions. But 'while the upper chambers of all constitutional legislatures recognise their position as one removing them entirely from party considerations, and as designed to be a guard against hasty and immature legislation, they would doubtless feel it to be their duty to weigh with more than ordinary anxiety and care the explicit declarations of public opinion, when deliberately given by all classes of the community upon any measure, after the period of excitement which might have given rise to it had passed away. When such a spirit pervades the upper chamber, there need be no apprehension of a conflict between the two branches composing the legislature.'^q

^o Victoria Rev. v. 1, pp. 869-875.

^p See Todd, Parl. Govt. v. 2, pp. 387, 398, new ed. pp. 484, 496.

^q Report of comm. of New Zealand Leg. Coun. in 1868, on the powers and privileges of legislative councils in the British colonies. And see a further report in 1869,

which cites the opinions of constitutional authorities on the subject. See also Earl Grey's despatch of Nov. 3, 1846, to Governor Harvey, of Nova Scotia; and the Duke of Newcastle's despatch, dated Feb. 14, 1862, to Governor Dundas, of Prince Edward Island.

Constitu-
tion of the
two cham-
bers.

While there is at present no instance of a single chamber with full parliamentary powers in a British colony under responsible government,^r the two legislative chambers—which, with the governor who represents the Crown, form the parliament in the principal colonies of Great Britain—are not invariably constituted upon a similar basis. With a common design to reproduce in the colony institutions intended to resemble as closely as possible those which exist in the mother country, the upper chamber is in some colonies an elective body, whilst in others it is nominated by the Crown. This diversity of practice is not based upon any definite or abstract principle, but is simply owing to the prevailing tone of popular opinion in the particular colony, to which upon this question the Imperial government has invariably deferred.^s

The number of members in the legislative councils in Australia was originally fixed at from one-half to one-third of the number of the assembly. Of late years the popular branch has usually become larger in proportion, but the principle of the original rule is still adhered to, so far at least as to prevent large additions to nominated legislative councils for party purposes, and to discredit additions to the same beyond a fixed limit, except in extreme cases.^t

Nomi-
nated or
elected
upper
house.

Thus, in Canada, the senate is nominated by the Crown; but a senator must be a resident in the province for which he is appointed; and in the case of Quebec must reside or possess his property qualification in the electoral division for which he is appointed.^u The members require to be of the age of thirty years,

^r Lord Kimberley's Despatch to Governor of Natal of Feb. 2, 1882, Com. Pap. 1882, v. 47, p. 369.

^s For discussion of comparative advantages of nominated and elective upper chamber, see Vic. Rev. v. 6, p. 87.

^t Queensland Leg. Coun. Jour.

1866, App. No. 6; *ib.* 1874, p. 961; *ib.* 1876, p. 1,005. As regards New Zealand, see *post*, p. 752. As regards Victoria, see The Colonies, May 28, 1881, p. 7.

^u B. N. A. Act, secs. 22, 23. See Doutré, Const. of Canada, p. 77.

and to be in possession of real or personal property to the extent of 4,000 dollars. In New South Wales, in Queensland, and in New Zealand the legislative councils are nominated by the Crown, and no qualification is required except that the members shall be British subjects and not under twenty-one years of age. At the Cape, the legislative council is elected by the same voters as the house of assembly, but a qualification of 2,000*l.* real or 4,000*l.* personal property is requisite for a seat in the council. In South Australia the legislative council is elected by the whole colony voting as one district. There the electors, only, must have a property qualification, freehold of 50*l.* or leasehold of 20*l.*, while there is no such qualification for electors as regards the house of assembly. In Victoria the legislative council members are elected on a qualification of 100*l.* in real property. The electors are also required to have a certain amount of property qualification—property of the rateable value of 25*l.* per annum, or of the real value of 10*l.* In Tasmania there is no property qualification for members of the legislative council, but they are elected by owners of freehold property of the value of 20*l.* a year, or leasehold property of the value of 80*l.* So that, of the colonies here mentioned, the leading colonies possessing representative institutions, there are four in which members of the legislative council are nominated by the Crown, namely, Canada, New South Wales, New Zealand, and Queensland; there are two, Victoria and the Cape, in which they are elected with a property qualification for members; and there are two in which they are also elected with a property qualification for electors, but wherein no qualification is required for members themselves, namely, Tasmania and South Australia.^a It is cus-

Upper
chambers.

^a N. Zealand Parl. Deb. v. 29, to alter the tenure of upper chambers in the colonies, *post*, p. 748. p. 248. See further, as to proposals

Upper
chambers.

tomary to provide—in the constitution acts—in regard to life members of the upper house, that they shall be permitted to resign their seats, and that in the event of their failing to attend parliament for two successive sessions, or one entire session, without leave of the council—as in Victoria, by Imperial act, 18 & 19 Vic. c. 55, sec. 24—or becoming foreign citizens or subjects, bankrupt, insolvent, or public defaulters, or be attainted of treason, or convicted of felony, or of any infamous crime, their seats in the council shall thereby become vacant. Questions arising upon vacancies in the upper chamber are to be determined by the house itself.^b

Disquali-
fication.

In addition to the above-mentioned causes of disqualification the New Zealand disqualification act, 1878, forbids all contractors and civil servants (while holding office, or for six months thereafter) from being summoned to, or sitting or voting in the legislative council or assembly. And no ex-member of either house is capable of being appointed to the permanent civil service within twelve months of the time he was a member. The procedure to be followed by the legislative council upon the occurrence of either of these causes of disqualification is pointed out by the report of a committee of the legislative council on August 10, 1880, which states that the alleged disqualification having been ascertained by inquiry by a select committee and affirmed by the council, the governor should be notified thereof by an address. This report was afterwards agreed to, and a select committee appointed to inquire into the alleged disqualification of one of the members. The committee reported that the disqualification did exist; this report was affirmed on August 25, 1880, and ordered to be communicated to the governor.

Contractors had previously been disqualified in New Zealand by an act passed in 1870. The law was amended in 1875, 1876, and 1877, and a new disqualification act substituted for it in 1878.

^b The following is the amount of sessional indemnity paid to members in the colonies mentioned:—Canada, 200*l.*, or \$1,000⁰⁰, and mileage; New South Wales, 300*l.* (Assembly); New Zealand, Leg. Council, 150*l.*; Representatives, 240*l.*; Queensland, 150*l.* and mileage; South Australia, 200*l.*; Victoria, 300*l.* For return of members of Imperial House of Commons in receipt of public money, see Com. Pap. 1893, No. 245. For list of ex-ministers pensioned, *ib.* No. 249.

By the Tasmania act of 1870, No. 42, which made the legislative council elective, contractors were also disqualified. Also in Queensland by the local constitution act, 31 Vic. c. 38, sec. 6.^c The same law was embodied in the schedule to the Imperial act 18 & 19 Vic. c. 55, sec. 25, establishing a constitution for Victoria, but it was repealed and re-enacted with more stringent provisions, vacating, likewise, the seats of members of either house who should accept of any office or place of profit under the Crown, and forbid their re-election.^d These restrictions, of course, do not forbid a limited number of ministers of the Crown from holding seats in parliament. Note a judgment of the supreme court in equity of British Columbia in 1880, refusing an injunction to restrain a member of the house and of the local cabinet from continuing to sit without re-election, he having undertaken to act as counsel for the dominion government in a certain case, notwithstanding restrictions imposed by the local 'independence of parliament' act, 1875. The injunction was refused on the grounds that by law no fee was 'attached' or could be legally demanded by a lawyer for professional services rendered.^e

Disquali-
fication.

In Victoria, in 1880, upon a vacancy occurring under the constitution act in the legislative council by the non-attendance of a member during the entire (previous) session, the president of the legislative council—after taking legal advice, this being the first occurrence of the kind—himself issued a writ, during recess, for the election of a new member, and reported the fact to the council on the first day of the meeting of parliament.^f

So freely has the principle of local self-government been conceded in regard to the composition and constitution of the legislative chambers, that, by the British North America act, the local legislatures in the Canadian provinces are empowered to amend their constitutions at will, except as regards the office of lieutenant-governor,^g a liberty of which some of the provincial legislatures have, as above mentioned, already availed themselves, by the abolition of a second or

Local le-
gisla-
tures
in Canada.

^c But see a decision of judicial com. of privy council on this act, in *Miles v. McIlwraith*, L. T. Rep. N.S. v. 48, p. 689.

^d Victoria Stat. 23 Vic. No. 91, passed in 1859.

^e Br. Columbia Sess. Pap. 1880, p. 429.

^f Vic. Leg. Coun. Votes and Proc. 1880-81, p. 14; and App. A, 1.

^g Br. N. Am. Act, 1867, sec. 92.

upper chamber, and other provinces have from time to time contemplated a similar reform.

Constitu-
tional
powers
of upper
house.

But whether constituted by nomination or election, the upper house in every British colony is established for the sole purpose of fulfilling therein 'the legislative functions of the house of lords,' whilst the lower house exercises within the same sphere 'the rights and powers of the house of commons.'^h It is, therefore, most desirable that in general persons should be chosen as members of an upper legislative chamber who already possess some measure of parliamentary experience and ability, besides being otherwise qualified for such honourable service.

It is only as a legislative body that the upper house in any colony can claim identity with the house of lords. No kindred institution created by statute can be the counterpart of that august and venerable chamber, either in respect to its unique position in the English political system, or in the dignity and eminent personal qualities for which its individual members are usually conspicuous. The adoption by a colonial upper chamber of the peculiar forms of parliamentary procedure which regulate the practice of the house of lords, is indeed a suitable method of marking a difference between themselves and the popular branch. But in no other way should a colonial senate or legislative council invite a comparison between themselves and the time-honoured hereditary house of peers. It is in order to discountenance such pretensions, and to assign to the upper house in a colonial system its true place as exclusively a legislative institution, and not as an aristocratic body clothed with personal privileges, that the Imperial parliament has pointed to 'the commons house of parliament of the United King-

^h See *ante*, p. 34.

dom,' as being equally the example to the senate or legislative council, as well as to the representative assembly, of the proper extent and limitation of the privileges, immunities, and powers to be defined on behalf of each house by a statute to be locally passed for that purpose.¹

Defined
by statute.

Pursuant to such Imperial statutes, which authorise certain colonial legislatures, under an express limitation, to define their own powers and privileges by an act to be passed for that purpose,¹ the parliaments of New Zealand and of Canada have severally legislated so as to confer upon both their legislative chambers 'the like privileges, immunities, and powers' as were actually 'enjoyed and exercised by the commons house of parliament of the United Kingdom.'

In the case of New Zealand, the law was qualified by the addition of the words, 'so far as the same are not inconsistent with or repugnant to' the 'constitutional act' of the colony,^k a proviso which does not appear in the Canadian statute.¹ The addition of this proviso, however, does not materially affect the question in its constitutional aspect.

But neither the New Zealand nor the Canadian laws can be so construed as to warrant a claim by the upper chambers of either parliament to equal rights in matters of aid and supply to those which are 'enjoyed and exercised by the commons house of parliament of the United Kingdom'; for such a claim, if insisted upon, would, to a like extent, derogate from and diminish the constitutional rights of the representative chamber.

Rights of
both
houses in
supply.

The Victoria constitution act, 1855, sec. 56, and the British North America act, 1867, sec. 53, severally

¹ Br. N. Am. Act, 1867, sec. 18. Privileges Act, 1865, No. 13, sec. 4.

^j See *ante*, p. 688.

¹ Canada Stats. 1868, c. 23.

^k New Zealand Parliamentary

Revenue
and tax
bills.

declare that 'bills for appropriating any part of the public revenue, or for imposing any tax or impost, shall originate in the [assembly or] house of commons.' No further definition of the relative powers of the two houses is ordinarily made by any statute; but constitutional practice goes much farther than this. It justifies the claim of the Imperial house of commons (and by parity of reasoning, of all representative chambers framed after the model of that house) to a general control over public revenue and expenditure—a control which has been authoritatively defined in the following words:—'All aids and supplies, and aids to his Majesty in parliament, are the sole gift of the commons, and it is the undoubted and sole right of the commons to direct, limit, and appoint in such bills the ends, purposes, considerations, conditions, limitations, and qualifications of such grants, *which ought not to be changed or altered by the house of lords.*'^m

This parliamentary principle, moreover, has been generally, if not universally, admitted in all self-governing British colonies by the adoption in both legislative chambers of standing orders which refer to the rules, forms, usages, and practices of the Imperial parliament as the guide to each house in cases unprovided for by local regulations.

Scheme
to improve
the upper
house.

An able and thoughtful colonist in Australia (Mr. J. E. Fitzgerald, C.M.G., controller and auditor-general, New Zealand) has proposed an ingenious method of improving the composition of the second or upper chamber in the colonies. He starts with the assumptions—which are abundantly confirmed by colonial experience—that an upper house is desirable; that it should be independent of party; that its duty should be to criticise and revise the legislation of the popular branch, and to delay great constitutional changes in the law until the will of the people has been permanently and conclusively ascertained; that it should be pre-

^m Resol. House of Commons, July 3, 1678. And see Todd, *Parl Govt.* v. 1, p. 458, new ed. p. 808.

eminently a popular body, consisting only of men who have received the continued confidence and respect of the people, by past services in some established capacity, whether political, administrative, legal, commercial, educational, scientific, or military ; that it should embrace representatives of the several classes into which society naturally divides itself, and of all who are leading and guiding the thought of their country and their time. Out of men possessing such qualifications an electoral college should be formed ; and on any vacancy occurring in the upper house the electoral college (like the peers of Ireland) should choose one of their own number to fill the vacancy. The upper chamber to consist of a limited number of members, sitting only for a definite term of years, but capable of re-election. Out of such materials a political aristocracy might be formed, which would consist of men who were not of accidental or artificial pre-eminence, but who had achieved their position by labour, study, ability, and honesty, and who had previously won the confidence and esteem of their fellow citizens. Their functions, as an upper house, would be necessarily and deservedly exalted, for they would constitute a court of appeal from the immediate representatives of the people, and if not selected out of the best material ought not to occupy such an influential and powerful place. Such a body would be independent of party considerations, and well qualified to fulfil the appropriate functions of an upper chamber.^a

Upper
chamber.

In 1854 a difference arose between the two houses of the New Zealand legislature, as to the statutory right of the legislative council to amend bills of supply. Although the original constitution was silent upon this point, the secretary of state for the colonies was of opinion from the first that the Imperial practice should, by analogy, prevail.^o The difference was disposed of for a time, but was again revived in 1872, when the council contended that the New Zealand 'parliamentary privileges act of 1865'^p had placed both houses upon an equal footing in respect to money bills, and empowered them to amend such bills as freely as other measures. The assembly resented this pretension, as being an unconstitutional encroachment upon their peculiar privileges. Unable to agree, by mutual consent a case was prepared for the opinion of the law officers of the Crown in England, which was forwarded to her Majesty's secretary of state for the colonies by the governor.

Contro-
versy in
New
Zealand.

^a See his paper in the Vic. Rev. Oct. 1882, p. 640. See also Mr. Napier's paper on Colonial Democracies, *ib.* 1882.

^o Rusden, Hist. of N. Zealand, v. 1, p. 553 ; v. 2, p. 157.

^p See *ante*, p. 705.

Contro-
versy in
New
Zealand.

In due course a reply was received from these eminent legal functionaries, which was transmitted to the governor for the information of the colonial legislature, and is as follows^a :—

The Law Officers of the Crown to the Earl of Kimberley.

Temple : June 18, 1872.

MY LORD,—We are honoured with your lordship's commands signified in Mr. Holland's letter of the 12th instant, stating that he was directed by your lordship to acquaint us that a difference having arisen between the legislative council and house of assembly of New Zealand concerning certain points of law and privilege, it was agreed that the questions in dispute should be referred for the opinion of the law officers of the Crown in England.

That he (Mr. Holland) was accordingly to request us to favour your lordship with our opinion upon the accompanying case, which had been prepared by the managers of both houses.

In obedience to your lordship's commands, we have the honour to report—

(1) We are of opinion that, independently of 'the parliamentary privileges act, 1865,' the legislative council was not constitutionally justified in amending 'the payments to provinces bill, 1871,' by striking out the disputed clause 28. We think the bill was a money bill, and such a bill as the house of commons in this country would not have allowed to be amended by the house of lords ; and that the limitation proposed to be placed by the legislative council on bills of aid or supply is too narrow, and would not be recognised by the house of commons in England.

(2) We are of opinion that 'the parliamentary privileges act, 1865,' does not confer on the legislative council any larger powers in this respect than it would otherwise have possessed. We think that this act was not intended to affect, and did not affect, the legislative powers of either house of the legislature in New Zealand.

(3) We think that the claims of the house of representatives, contained in their message to the legislative council, are well founded ; subject, of course, to the limitation that the legislative council have a perfect right to reject any bill passed by the house of representatives having for its object to vary the management or appropriation of money prescribed by an act of the previous session.

We have, &c.,

J. D. COLERIDGE.

G. JESSEL.

The Right Hon. the Earl of Kimberley.

^a Rusden, Hist. of N. Zealand, v. 3, p. 8 ; N. Z. Assem. Pap. 1872, App. A,

This opinion is a direct and unimpeachable settlement of the point at issue, and one that is equally applicable in the interpretation of the Canadian statute of 1868, c. 23.^r

Controversy in New Zealand.

A new parliamentary privileges bill was introduced in New Zealand in 1881, and again in 1883, but it failed to pass, because the legislative council, while no longer insisting on the claim they had made in 1871 in respect to money bills, were of opinion that it was 'not expedient to attempt to fix by statute the legal relations of the two houses in reference to money bills;' they preferred to rely for a guide on the practice and precedents of the Imperial parliament, which are now the recognised authority.^s In the previous year the assembly (as advised by the then premier, Mr. Hall) had evinced a special recognition of the legislative rights of the upper chamber by giving effect to resolutions for the general reduction of salaries by ten per cent., by means of a separate bill, instead of including the same in the appropriation bill.^t In 1882 a dispute between the two houses as to the regularity of an amendment by the council to a pensions bill was referred to the decision of Sir E. May, who, in reply, confined himself to stating the Imperial practice in such cases.^u

The relative rights of both houses in matters of aid and supply must be determined, in every British colony, by the ascertained rules of British constitutional practice. The local acts upon the subject must be construed in conformity with that practice wherever the Imperial polity is the accepted guide. A claim on the part of a colonial upper chamber to the possession of equal rights with the assembly to amend a money bill would be inconsistent with the ancient and undeniable control which is exercised by the Imperial house of commons over all financial measures. It is, therefore, impossible

British practice the guide

No. 1, b. p. 6. And see New Zealand Parl. Deb. Sept. 3, 1872.

^r Mr. Nowell, in his work on the Relations between the Two Houses of Parliament in Tasmania and South Australia, p. 83, queries this act for that of 1867; he does not seem to be aware that the author is citing the privileges act

of 1868, and not the British North America act of 1867!

^s N. Zealand Leg. Coun. Jnls. 1881, p. 208; and see N. Z. Parl. Deb. v. 44, p. 148.

^t Rusden, Hist. of N. Zealand, v. 3, p. 350.

^u N. Zealand Parl. Pap. 1882, App. A, 9.

Money
bills and
the upper
house.

to concede to an upper chamber the right of amending a money bill upon the mere authority of a local statute, when such act admits of being construed in accordance with the well-understood laws and usages of the Imperial parliament.^v

Mr. E. C. Nowell, clerk of councils, Tasmania, takes exception to the author's conclusion on this point, claiming that the relations between the two chambers in the colonies differ from those of the Imperial parliament, inasmuch as the privileges of the houses in England are by prescription, while those in the colonies are by statute. 'Both houses in the colonies are, in fact, houses of commons, only that the one is not empowered to originate money votes.'^x

In Queensland, on July 9, 1874, the president of the legislative council decided that, under the second clause of 'the constitution act,' it was competent for the council to deal with the 'customs duties interpretation bill' in any way it thought fit. The bill was amended, and then dropped. But in 1877 the legislative council admitted 'that in the practical working of the constitution, in this colony, the tacit arrangement existing between the houses of lords and commons in the Imperial parliament has been acquiesced in by this legislature.'^y

Claims of
elective
upper
chambers
in supply.

In certain British colonies—as, for example, in South Australia, Tasmania, Victoria, and the Cape of Good Hope—the legislative council is elective, whilst generally the system of nomination prevails. The elective councils have plausibly urged that—in accordance with the practice in the United States, where, in congress and in the different state legislatures, while the constitution requires that tax bills shall originate in the lower

^v See, to the same effect, the despatch of the colonial secretary to the governor of New Zealand, of March 25, 1855, before the passing of the Parliamentary Privileges Act; Com. Pap. 1860, v. 46, p. 466. For a statement of the respective constitutional rights of the two houses in matters of supply, see a report of a committee of the Leg.

Assem. of Victoria, on Oct. 30, 1877; Votes and Proceed. L. A. Vic. 1877-78, v. 1, pp. 192, 251.

^x Nowell, Relations between Houses of Parl. in Tasmania and S. Australia, p. 86. 8vo. Tasmania: 1890.

^y Queensland Leg. Coun. Jour. 1877, p. 193. And see *post*, p. 522.

Elective
upper
chamber
in supply.

branch, it is customary to provide that the senate or first branch may concur therein with amendments, as in other bills^z—they ought to be at liberty to propose amendments to bills of supply. In the Cape of Good Hope no alteration by the legislative council of a money bill, which is inconsistent with the privileges of the assembly, is permitted by that house.^a In South Australia and in Tasmania this claim has been partially allowed by the lower house; but in Victoria the strictest limitation of the powers of the upper chamber has been insisted upon (as will be presently shown), in conformity with the constitutional practice of the Imperial parliament.

In South Australia the legislative council has denied to the assembly any exclusive rights over money bills—except the right of originating such measures—upon the ground that they were as much representatives of the people as the other chamber.^b But in November 1857 both houses came to an agreement by which the right of making certain amendments to supply and tax bills—though not to the money clauses therein—was acknowledged. It was further understood that the legislative council might offer *suggestions* for the amendment of such parts of supply or tax bills as dealt with money or taxation. This arrangement was afterwards carried out, at least for a number of years, with mutual satisfaction.^c

In the session of 1876 the legislative council of South Australia suggested that the assembly should strike out from a public pur-

^z Cushing, *Lex Parliamentaria Americana*, p. 891.

^a Cape Assem. Votes, Sept. 10, 1879.

^b See South Austral. Parl. Proc. 1857-58, v. 1, *passim*, v. 2, Nos. 71 and 101.

^c South Austral. Parl. Proc. 1874, v. 1, pp. 27, 33, 51. Assem. Votes,

ib. pp. 160, 181. *Ib.* 1877 (Assem. Pap.), No. 92. In 1879 a deadlock was threatened between the two houses, owing to the rejection by the council of bills passed by the assembly (The Colonies, Aug. 30, 1879, p. 6), but happily it was removed.

Dispute in
South
Australia
on supply.

poses loan bill items amounting to about 125,000*l.*, for certain local improvements, but the assembly refused to concur in this suggestion. The legislative council, by a bare majority of one, decided not to withdraw their suggested amendments, and the bill was dropped. Whereupon the government introduced another bill, from which they omitted the items objected to by the council ; and this bill was passed, without difficulty, by both houses.^d

In 1877, however, a more serious disagreement occurred in this colony. On June 12 inquiry was made of ministers in the legislative council in regard to certain rumoured preparations for the erection of new parliament buildings. In reply, the council was informed that the government contemplated the building of a new chamber, as part of a proposed design for the better accommodation of both houses, but that no money had yet been voted for the purpose.

Upon which, on July 5, the legislative council resolved that the action of government, in deciding upon a site, and commencing to build new houses of parliament, without the (previous) sanction of both branches of the legislature is unconstitutional, and does not meet with the approval of this council.

A private member then gave notice of a motion for an address to the administrator of the government to represent the right of the legislative council to be consulted on this subject. Sir Henry Ayers (chief secretary and leader of the government in this house) then gave notice of a motion to resolve that it is desirable to proceed immediately with the erection of the new assembly chamber.

Supply
in South
Australia.

On July 25, before the afore-mentioned notices were discussed, it was resolved that the chief secretary, by ignoring the constitutional rights of this council, and by his conduct generally with reference to the proposed new parliament buildings, has lost the confidence of this council.

On July 31, in amendment to a motion by the chief secretary, that the council, at its rising, should adjourn to the following day, it was resolved, that this house would not proceed to business so long as the government is represented in the chamber by a member in whom it had no confidence ; and therefore that business be postponed for a week, to afford the ministry an opportunity of changing their representative. No such change having taken place, further adjournments were made, for a week at a time, until August 28.

On that day a motion to resolve, that the council insists upon

^d South Austral. Parl. Proc. 1876, pp. 125-128, 131 ; The Colonies, newspaper, Jan. 20, 1877, p. 2.

its rights to be forthwith consulted upon the necessity and expediency of building new houses of parliament at the present time, was negatived upon the previous question. The council then adjourned.

On August 29 it was resolved, that this council, while objecting to the leadership of the present chief secretary, will proceed with business, and directs that all public bills received from the assembly be placed in charge of the Hon. William Morgan, a private member of the house. The council then adjourned until September 4, and afterwards until September 11, and September 18, doing some business at each sitting.

Leadership in legislative council given to a private member.

The chief secretary denied the right of the legislative council to take the conduct of public business out of his hands without the consent of the governor; but the speaker, on September 18, presented a written statement, confirmatory of a previous ruling, justifying this proceeding, after which Mr. Morgan assumed the leadership. The council then adjourned until September 25.

On September 27 it was moved that an address of remonstrance be presented to the administrator of the government. But, being a complicated question, it was resolved to consider this motion in separate paragraphs. On October 4 the address was agreed to, and ordered to be presented to the governor (meanwhile, on October 3, the house was informed that Sir William Jervois had been appointed governor). It represented that ministers had begun to erect new parliament buildings, pursuant to a resolution of the house of assembly, passed October 13, 1876, but without the necessary appropriation for such an expenditure, as required by the constitution act. The works were afterwards stopped; but the assembly, on June 13, 1877, had resolved that they ought to be immediately resumed, which was done accordingly, though no money had yet been voted, nor had the consent of the council been given to this expenditure. So far back as in 1864 the council had addressed the governor, asserting its equal constitutional right with the assembly to be consulted upon, and to give or withhold its approval to, every grant or appropriation of public money. In reply, Governor Daly had endorsed this principle, and expressed his desire to conform the colonial practice as far as possible to that of the Imperial parliament, by substituting supply bills for resolutions of the assembly, which heretofore had been deemed a sufficient warrant for public expenditure.

Supply in South Australia.

The address proceeded to recite the resolutions previously passed by the council on this question, and in regard to the 'defiant and discourteous' action of the leader of the government in the council above-mentioned. It stated their willingness to proceed with all

Dispute
in South
Australia
on supply.

pressing legislation, provided that the business before the council should be in charge of a leader in whom they had confidence.

Furthermore, they called the attention of the governor to certain proceedings in the assembly which showed that ministers denied the right of the council to determine who should act as leader of the house.

The council had thus far refrained from expressing a want of confidence in the whole ministry, but they now submitted that the premier could not continue to treat with indifference the want of confidence the council had expressed in the chief secretary without detriment to the public interests, and great injury to the working of responsible government. Apprehending that the ministerial policy tended to the complete subordination of the council to the assembly, and to bring about a collision between the two houses, thereby coercing the council with the weight of the assembly's authority, they concluded by requesting the governor to take such steps as he might deem expedient in the present crisis.

Irregular
action of
legisla-
tive coun-
cil on the
leader-
ship.

Upon the receipt of this address on October 9, the governor promised that the important questions referred to therein should receive his best attention. Upon October 23 the governor sent down a formal reply. He assured the council of his earnest desire to preserve inviolate their constitutional rights and privileges, but expressed his disapproval of their action in taking the conduct of public business from a minister of the Crown and placing it in the hands of a private member. This step he regarded as 'opposed to parliamentary practice, and detrimental to the privileges of the Crown, as well as to the integrity of parliamentary procedure.' Ministers had assured him of their sincere desire to avoid a collision between the two houses, that their policy had no tendency to subordinate the legislative council to the assembly, and that they felt it to be not only their interest but their paramount duty to use all legitimate means to promote harmony between both houses. They had, accordingly, stopped the progress of the works objected to, and would incur no further expenditure thereon until due provision had been made by parliament.

Meanwhile, the house of assembly had taken up the question. On October 17 the assembly resolved that this house disapproves of the action of the ministry in the conduct of its business, as needlessly tending to provoke a collision between the two houses of parliament.^e This vote led to the resignation of ministers, which

^e This resolution was passed by upon the principle 'that when, on a the casting vote of the speaker, vote of want of confidence, a minis- without expressing any opinion, try do not command a majority, it

took place on October 23—the very day on which the governor's message in reply to the address of the legislative council was communicated to that body.

Dispute in South Australia on supply.

On October 30 both houses met, and the new ministry appeared in their places.^f The office of chief secretary had been conferred upon Mr. Morgan, the person who, whilst merely a private member, had been charged by the legislative council to act as leader of the house, instead of Sir Henry Ayers. A notice had been put upon the council paper for the adoption of a further resolution justifying the action of the council in the matter of the leadership, and expressing regret that ministers had advised the governor to disapprove of the same. But on November 13 this intended motion was, by leave, withdrawn.

On November 6, in the house of assembly, an item in the estimates for a vote of 10,000*l.* towards the new parliament buildings was struck out on motion of a minister of the Crown. And on November 8 a government bill was introduced to authorise the construction of new parliament buildings. On November 15 this bill was passed and sent up for the concurrence of the legislative council.

On November 27, in amendment to a motion for the second reading of the new parliament buildings bill, the council resolved that the bill be not proceeded with, but that the governor be requested to appoint a commission to inquire into and report upon the necessity for the proposed new buildings. Two days after, however, on motion of the chief secretary (Mr. Morgan), this resolution was rescinded, and the parliament buildings bill read a second time. It was afterwards passed with an amendment which was amended by the assembly. The council agreed to this amendment, and the bill became law.

Thus the protracted difficulties between the two houses, upon this question of supply, were brought to a happy termination. The governor, in his speech on proroguing parliament on December 21, congratulated both houses that, by the exercise of a spirit of con-

Disputes between two houses settled.

is the duty of the speaker to vote with the ayes.' Votes of Assembly, South Australia, 1877, p. 236. And *ib.* 1871, p. 226. But this conclusion differs from the opinion and practice of other authorities in Australia, and elsewhere in similar cases. See *ante*, pp. 602, 663, and *post*, p. 776. The speaker (Sir G. S. Kingston) was first chosen in 1858 and, with a brief interval,

continued to fill the chair until 1880, when his health compelled him to seek retirement (The Colonies, Dec. 11, 1880, p. 7).

^f In South Australia, and likewise in New Zealand, the law permits members of either house to accept ministerial office without being required to vacate their seats and offer themselves for re-election. See *ante*, p. 60.

South
Australia
in matters
of supply.

ciliation and by mutual concessions, the disputes which had occurred in the early part of the session had been satisfactorily adjusted ; and that they had thus avoided the disastrous consequences which must inevitably have ensued from any serious collision between the two branches of the legislature.^g

On July 13, 1882, a resolution was proposed in the legislative council of South Australia by the commissioner of public works, to declare the expediency of certain expenditure 'to provide immediately for the better defence of the colony,' which was agreed to.

In 1879 a royal commission was appointed in South Australia to inquire into the best means of giving the house of assembly greater control over the expenditure of money raised by loan under the authority of parliament, and generally into questions of public finance. An elaborate progress report was made in 1880, which treats of the practice in all the Australasian colonies in financial matters.^h It refers to the relative powers of the different branches of the legislature upon such questions as being to a very great extent undefined, but does not distinctly advise the determination of any constitutional question.

Tasmania
legisla-
tive coun-
cil in
matters of
supply.

In Tasmania the elective legislative council is also permitted to amend tax bills and supply bills, even the annual bills of appropriation.ⁱ

On May 13, 1879, the legislative council of Tasmania, on motion for the second reading of the supply bill, resolved that, inasmuch as this bill provides for an expenditure far in excess of the probable revenue for the current year, the council deem it inexpedient to authorise any appropriation beyond what may be necessary for the public expenditure of the first *six* months of the said year. The supply bill was accordingly amended to this effect. This proceeding led to much debate between the two houses. Ultimately the

^g South Austral. Parl. Proc. 1877, v. 1, *passim*. Subsequently the Morgan ministry decided to postpone indefinitely the erection of new parliament buildings (*ib.* Assem. Votes, 1880, pp. 62, 90, 136; The Colonies, Aug. 27, 1881). This contributed to the maintenance of a good understanding between the two houses. But in Sept. 1881 the project was revived by the assembly, and concurred in by the council (*ib.* Nov. 19, 1881; Jan. 6, 1882). On

August 30, 1882, the leg. council reiterated their objection to the proposed new buildings. But see *post*, p. 775.

^h South Austral. Parl. Proc. 1880, v. 3, No. 26.

ⁱ Tasmania Leg. Coun. Jour. 1877, pp. 39, 40, 117, 119; *ib.* Oct. 26, 1880; *ib.* Oct. 24, 1883, p. 118. And see proceedings of leg. council on grant of supply upon a change of ministry in Jan. 1879, *ib.* 1878-79, No. 104.

assembly unanimously agreed to accept a limitation of the grant of supply to *nine* months of the current year.^j

Tasmania
in matters
of supply.

The council adhered to their amendment of the supply bill, but agreed, if the assembly should accept this amendment, to receive favourably a further supply bill, for the additional period which ministers had requested, in order that they might reconsider their financial propositions. In reply, the assembly, anxious to preserve amicable relations with the other house, expressed their willingness to accept a supply for *eight* months, but declined to embody this intention in a separate bill. Whereupon the legislative council sent a message to the assembly, adhering to their former offer, and justifying their course by a reference to parliamentary practice.^k The council, however, afterwards accepted the amendment made by the assembly to their own amendment; and so the appropriation bill was passed, providing supplies for eight months only of the current year, of which period nearly six months had expired before the royal assent was given to the bill.

The council, in agreeing to this compromise, transmitted a resolution to the governor in explanation of the course they had taken, from which it appeared that considerable arrears of debt had accumulated, for which, as well as to meet accruing liabilities, it was imperative that provision should be made; that the legislative council had been assured by ministers that, before the expiration of the period for which supply had been granted, they would be prepared with measures calculated to meet the present and accruing necessities of the country; that, while the legislative council had no desire to interfere irregularly with the exercise of the undoubted prerogative of the Crown in the summoning, proroguing, and dissolving of parliament, yet they fully relied upon his excellency to appreciate their endeavour to arrest the growth of financial embarrassment.^l

On June 17 the governor replied to this address by a message, wherein he 'assures the council that parliament may always rely upon his acting in strict accordance with constitutional usage and precedent in the exercise of the powers entrusted to him by the Crown.' Two days later, parliament (which had been in session for eleven months) was prorogued by proclamation. Upon the re-assembling of parliament, on September 9, the legislative council adopted, on September 11, a protest against the further delay in

^j Tasmania Leg. Coun. Votes, June 3, 1879. And ministerial memo. *ib.* June 10.

^k *Ib.* June 10 and 11, 1879.

^l Tasmania Leg. Coun. Votes, and ministerial memo. June 12 and 13, 1879.

Tasmania
in matters
of supply.

dealing with the urgent public business of the country, consequent upon an intended adjournment, for the purpose of attending the opening of the great exhibition in Sydney.

Upon the eve of the adjournment of parliament the legislative council, on October 31, 1879, passed an address to the governor expressive of the reluctance with which they had assented to a bill for raising a certain sum by treasury bills, from a sense of the large financial arrears which were accumulating, and begging the interference of the governor to prevent objectionable arrangements being carried out by ministers. The governor referred this message to ministers. They replied to it by a memorandum which admitted the constitutional propriety of the governor's interposition to point out to ministers any proceeding which he might consider was not fully warranted by law, and bore testimony to the vigilance invariably displayed by his excellency under such circumstances. His views on such questions had always been carefully considered, and, unless his objections were removed by discussion, they were in all cases acceded to. But ministers submitted that the governor's constitutional duties were confined within these limits, with such advice as (in other matters) he thought fit to give in consultation. And they protested against the interference by a constitutional governor in financial arrangements regarding expenditure authorised by parliament as tending to substitute irresponsible personal government for the proper action of ministers in a self-governing colony. The governor (Weld) transmitted this memorandum to the legislative council (on the reassembling of parliament) on January 13, 1880, expressing his general concurrence therein, as embodying the constitutional views to which he had always adhered, as well formerly when prime minister in another colony as here as governor.^m On March 9, 1880, the assembly resolved that the legislative council had embarrassed public business and exercised an unconstitutional power in adjourning for three months while an important financial measure was under consideration. Two days after the governor prorogued parliament by proclamation to a period exceeding three months.ⁿ

On September 21, 1881, the legislative council of Tasmania agreed to a resolution censuring the conduct of the colonial secretary, the leader of the government in that chamber, in refusing to proceed with government business because of the action taken by the house upon certain bills.

On October 19, 1883, the house of assembly, in considering

^m Tasmania Leg. Coun. Pap. 1879-80, No. 75.

ⁿ Assem. Votes, 1879-80, v. 36, pp. 143-145.

amendments made by the legislative council on the 'branch roads construction bill,' expressed the opinion 'that when a bill which contains a vote of money for the construction of any public work has been transmitted to the legislative council, it is not competent for the council, after striking out such vote from the bill, to introduce it into any other bill which may then be in the possession of the council.'^o

Tasmania
in matters
of supply.

The legislative assembly of Quebec, on account of differences with the upper house in matters of supply, adjourned over from September 2 to October 28, 1879, the minority protesting against the irregularity of the proceeding.^p

In Victoria the differences between the two houses in matters of supply have been of longer duration and have been prosecuted with greater acrimony than in any other colony. Several questions of constitutional importance arose during the course of this protracted controversy. It may be profitable, therefore, to trace briefly the history of some of these struggles, dwelling particularly upon the last contest mentioned, which began in 1877 and lasted so long.

Disputes
in
Victoria.

From the introduction of parliamentary institutions into Victoria, in 1856, until the year 1865, the two houses worked together, without any serious disagreement. In 1865 the first difficulty occurred. There was a vehement agitation in the colony in favour of a change in the financial policy of government. It was known that free trade principles prevailed in the legislative council, whilst the protectionist party had a majority in the assembly. The ministry remodelled the tariff in the interest of protection, and then resorted to the unjustifiable expedient of appending the new tariff as 'a tack' to the annual appropriation bill. The council indignantly rejected this composite measure, as being highly irregular and unparliamentary. Ultimately two separate bills were introduced, and each considered and disposed of upon its own merits. During the continuance of this altercation and dead-lock between the two houses the conduct of the governor was marked by so much indiscretion as to necessitate his recall. But, as we have already noticed this singular case in a previous section,^q it will be unnecessary to refer to it again in this place. Suffice it to say that the irregular and partisan action of Governor Darling on this occasion has been ever since scrupulously avoided by representatives of the Crown in all parts of the Queen's dominions.

In 1865.

^o Tasmania Leg. Coun. Jour. 1879, p. 349.

1883, p. 105.

^q See *ante*, p. 136.

^p Quebec Leg. Assem. Jour.

Disputes
in Vic-
toria on
supply
in 1867.

The next serious dispute between the two chambers in Victoria occurred in 1867, in the matter of the proposed grant to Lady Darling by the legislative assembly of 20,000*l.*, full particulars of which will be found in a previous chapter.^r The obnoxious item was included in the appropriation bill, which was accordingly rejected by the upper house. Another 'dead-lock' ensued, and various ministerial changes and complications followed. At length peace was unexpectedly restored by the resolution of Sir Charles Darling to refuse the intended grant, either for himself or his family, on condition that he should be reinstated in the service of the Crown and allowed a pension as a retired governor.

In 1877.

But the evil was only stayed for a time. In 1877, fresh dissensions broke out between the assembly and legislative council of Victoria. The gravity of the situation and its extreme complexity, owing to the various elements of distraction which have arisen during this prolonged contest, will justify a fuller examination of this case than was necessary in former instances of a similar description.

The event which gave rise to the present dispute was the introduction by the assembly of a bill to renew an act for the payment of an indemnity to members of the legislature, which was about to expire.^s The legislative council had always been opposed to the principle of paying members of parliament, but had, on two or three previous occasions, reluctantly consented to temporary acts for that purpose.^t In 1877 a bill to continue the practice for a further term was sent up by the assembly for the concurrence of the upper house. Anticipating the probability of its rejection in that chamber an item was placed in the estimates and inserted in

^r See *ante*, p. 144.

^s In 1835 a similar difficulty arose in New Brunswick, which led to the loss of the appropriation bill, the legislative council refusing to concur in the payment of the expenses of members of the assembly (although they had been uniformly defrayed for thirty-four years), because the assembly would not agree to a similar provision, then first proposed, upon the recommendation of the Imperial government, for the payment of legislative councillors. *New B. Assem. Jour.* 1835, pp. 429, 478.

^t In 1880 a compromise was effected between the two houses on

this subject. A bill to pay the members of both houses was passed by the assembly, but by mutual consent it was afterwards divided into two measures, and the legislative council agreed to a bill to pay members of the assembly (Acts 1880-81, No. 666), but by a nearly unanimous vote refused to pay their own members (*Victoria Leg. Coun. Votes*, Sept. 30, 1880). A similar course has since been followed (*Vic. Stat.* 1883, No. 754). For an enumeration of the countries and colonies wherein payment of members prevails, see *Sergeant's Government Handbook*, 1890, p. 526.

the appropriation bill, to provide for this payment for the current year. Regarding this proceeding as an attempt to evade the consequences of the expected rejection of the members' indemnity bill, the council laid aside both bills. Ultimately, however, this new dispute was temporarily settled. A new appropriation bill, without the objectionable item, was introduced and passed, while the council consented to renew the act for the payment of members during the continuance of the existing parliament.

Disputes
in Vic-
toria on
supply.

But both houses were aroused to the necessity of disposing of the main question which lay at the foundation of these frequent disputes—namely, the constitutional rights of the two chambers in matters of supply. Accordingly, bills to amend the constitution upon this point were originated, and have been warmly discussed in each chamber, although hitherto without success.

Before noticing in detail the principal points which were urged on both sides during this last and most vehement struggle, it may be observed that the legislative council, though repeatedly charged with pressing their rights to an extremity, have uniformly disclaimed any desire to assert a right to control financial legislation. They have, in fact, considered the necessity for the repeated rejection of appropriation bills as in itself an intolerable grievance. They declare that they have been compelled to have recourse to this extreme proceeding, from the reiterated assertion by the assembly of their right to include in appropriation bills clauses for taxation, and grants involving new and grave questions of public policy, to which the council were known to be opposed. The assembly has furthermore claimed the right, upon their own mere resolution, to direct the expenditure of public money; a claim which is well known to be altogether untenable and unconstitutional.^u

We will now proceed to examine more minutely certain questions of interest which were brought prominently forward during the progress of these contests.

Constitu-
tional
points in
this dis-
pute.

One point of special magnitude in connection with these disputes between the two houses of parliament has been the attitude which it becomes the governor to assume, when the other branches of the legislature are in collision, upon a question of privilege, or of their several constitutional rights.

We have elsewhere seen that it is the bounden duty of the governor to occupy a position of strict neutrality between contending parties in politics, and of entire impartiality on all party questions which ought to be locally decided, 'and in which neither the prerogatives of the Crown nor other Imperial interests are involved.'^v

Position of
governor
in disputes
between
two
houses.

^u See *ante*, pp. 136, 708.

^v See *post*, p. 804; and Com. Pap. 1878, v. 56, p. 880.

Disputes
in Vic-
toria.

Upon such occasions the governor should refrain, except in the capacity of a mediator, from all personal interference, until at least he is called upon to do or to sanction an act which he might consider to be illegal ; in which case he should promptly and authoritatively interpose.

In the quarrel between the two houses in Victoria, in 1877, the governor (Sir George Bowen) resolved to adhere steadfastly to this rule of non-intervention between the combatants. Accordingly, when the legislative council informed him by address that they deemed the inclusion of an item for the payment of members in the annual bill of appropriation as an attempt to coerce them in the exercise of their legislative functions, the governor declined to interfere. In reporting this matter to the secretary of state, on November 26, 1877, the governor justified his conduct by citing from a despatch written by his predecessor, Sir J. Manners Sutton (afterwards Lord Canterbury), to the colonial secretary, dated October 26, 1867.

This despatch asserts the principle that while it should be the governor's 'earnest desire to contribute, as far as he can properly contribute, to the removal of existing differences between the two houses, it is clearly undesirable that he should intervene in such a manner as would withdraw these differences from their proper sphere, and so give to them a character which does not naturally belong to them, of a conflict between the majority of one or another of the two houses, and the representative of the Crown.' ^w

Governor Bowen's conduct, on this occasion, was moreover in complete accordance with constitutional practice in the mother country. In the memorable contest between the houses of lords and commons in 1860, which followed the rejection by the house of lords of the bill for the repeal of the paper duty, and which led in the ensuing year to the embodiment of the whole budget resolutions, including one for the repeal of the paper duty, in a single bill, it was reasonably contended that the action of the house of commons was not in conformity with precedent, and was indeed a high-handed proceeding, resorted to for the avowed purpose of depriving the lords of the opportunity of exercising a deliberate judgment upon the several and distinct legislative propositions included in this bill of supply. Nevertheless, no attempt was made to involve the Crown in this controversy, or to induce the sovereign to interpose for the purpose of protecting the privileges or securing the independence of the house of lords. ^x

^w See Victoria Parl. Pap. 1878, No. 27, p. 17. Also Com. Pap. 1878, v. 56, p. 715.

^x See Todd, Parl. Govt. v. 1, p. 459, new ed. p. 809.

Failing in their endeavour to persuade the governor to interfere on their behalf, the legislative council of Victoria proceeded to assert their own rights, by rejecting the appropriation bill, and other financial measures of considerable importance. This compelled the government to make large reductions in the public expenditure, with a view to economise the funds remaining at their disposal. The governor, meanwhile, adhered to his attitude of impartial non-intervention.

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in Vic-
toria.

But, in reporting these occurrences to the secretary of state, Governor Bowen, in a despatch dated December 26, 1877, pointed out that, in his opinion, as well as in that of his able predecessor in office, the difficulty underlying these political struggles between the two houses was that, while the assembly were contending for no more than the powers claimed by and conceded to the house of commons, the legislative council refused to be limited by the constitutional practice of the house of lords, and had put forth a pretension to be, in effect, 'a second house of commons.'^y

Undue
claims of
legisla-
tive coun-
cil in
Victoria.

The excuse preferred by the legislative council for such an extension of the ordinary and appropriate functions of an upper chamber was that being an elective body, whose privileges, immunities, and powers are, equally with those of the legislative assembly, declared by statute to be 'those of the commons house of parliament of Great Britain,' they were constitutionally empowered to deal with all questions of legislation upon an equal footing with the assembly, and that the only qualification of their legislative powers was that imposed by the fifty-sixth section of the constitution act, which provides that 'all bills for appropriating any part of the revenue of Victoria, and for imposing any duty, rate, tax, rent, return, or impost, shall originate in the assembly, and may be rejected but not altered by the council.'^z

In reply to Governor Bowen's despatch above cited, recapitulating the circumstances attending the rejection by the council of the appropriation bill and other financial measures, the colonial secretary (Sir M. Hicks-Beach), whilst refraining from an expression of opinion on the merits of the case until he should be more fully informed upon it, conveyed to the governor his approval of his excellency's efforts to maintain an impartial attitude, and to avoid interference with the responsibility of his advisers.^a

Meanwhile the Victoria ministers sought to obtain authority to

^y Com. Pap. 1878, v. 56, p. 756.
Victoria Parl. Pap. 1878, No. 27, p. 34.

^z Victoria Pap. 1878, No. 27, p. 29. 18 & 19 Vic. c. 55, sec. 56.

^a *Ib.* p. 35.

Issue of
supplies
on resolu-
tion of
assembly.

sanction the issue of public money, notwithstanding that the legislative council had refused to concur in the bills of supply sent up by the assembly for their assent. They addressed to the governor a memorandum, wherein they asserted the right of the 'governor in council' to sign warrants for the issue of public money, voted by the assembly for the public service, upon an address of the legislative assembly, in the event of the legislative council adhering to their determination to reject the bill of supply. They fortified their opinion by that of the law officers of the Crown in the colony, and inquired whether the governor was prepared to give effect to the same.

Governor Bowen, on December 31, 1877, transmitted this memorandum to the colonial secretary, requesting immediate instructions as to the course he should pursue. In a reply, sent by telegraph, on February 22, Sir M. Hicks-Beach said, 'I do not feel justified in volunteering any opinion on the memorandum, which I observe does not invite my intervention. Your duty in this question is clear—namely, to act in accordance with advice of ministers, provided you are satisfied the action advised is lawful. If not so satisfied, take your stand on the law. If doubtful as to the law, have recourse to the legal advice at your command.' In a despatch dated February 28, 1878, the colonial secretary reiterated these remarks, and expressed a hope that this question, being of local concern, might be speedily settled by mutual concessions; adding that, unless the controversy should unhappily prove incapable of settlement between the parties interested, he trusted that neither the Imperial government nor the governor might be drawn in to any share in it.^b

Dismissal
of
officials.

Pending the governor's decision as to the signing of money warrants upon an address from the assembly, ministers recommended certain important reductions in the public service, in order to make the supplies granted for the current year last some two months longer. No dismissals of public officers had taken place in 1867, when a similar dead-lock had occurred, though salaries were necessarily in arrear, for a considerable period. This time, however, ministers advised that a large number of officials of various grades, from county court judges to minor functionaries, should be dismissed.

After repeated discussions with ministers on the subject, the governor reluctantly consented to this act, being desirous 'to continue to co-operate with them on all occasions for the public good, and to follow generally their advice in all matters of local concern

^b Victoria Pap. 1878, No. 27, pp 6-39.

not repugnant to law.' But he declared his determination not to consent to any of the 'irregular financial contrivances which were adopted during a former parliamentary dead-lock in Victoria, and which were condemned by the then secretary of state for the colonies.'^c Neither would he sanction any measures to interfere with the currency or the banks, or which might affect the rights and property of British subjects abroad; for to do so would be a direct violation of the royal instructions.

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in Vic-
toria.

At this juncture the assembly, without concert or communication with the upper house, adjourned for six weeks. Whereupon the legislative council, in an address to the governor, remonstrated against this unprecedented interruption to public business, and pointed out its injurious consequences. The governor, in reply to this address, declared it to be his 'duty during the controversy which has unfortunately arisen between the two deliberative branches of the legislature to abstain from all interference otherwise than by earnestly recommending to both houses, in the interests of the public welfare, mutual forbearance and mutual concession.'^d

On January 25, 1878, Governor Bowen forwarded to the colonial secretary an opinion of the attorney-general of Victoria—concurring in an opinion given by Mr. Fellows, the solicitor-general, in 1858—that the assent of the legislative council to a bill of supply was not necessary in order to give validity to the issue of public money by the governor in council, inasmuch as 'resolutions of the committee of supply, reported and adopted by the house, make the amount *legally available*.' But from certain correspondence with the commissioners of audit accompanying this opinion it appears that while for a time this erroneous idea had prevailed, in 1862 the true constitutional practice had been introduced, and it had since been customary, as in England, to pass acts in anticipation of the annual appropriation act to legalise the issue of money voted in supply.

Issue of
money
without
assent of
legisla-
tive
council.

Moreover, Mr. Fellows, who as solicitor-general had expressed the opinion above stated, afterwards in a speech delivered in the legislative council of Victoria, in 1865, admitted that he had made a mistake. He had since learnt that, in England, money was not issued 'upon the vote of the house of commons,' but 'only by means of an act passed by both houses, and assented to by her Majesty, and providing expressly that any votes of the house of commons might

^c See *ante*, p. 136.

as of *ib.* p. 715, are included in the
Victoria Pap. 1878, No. 27.

^d Com. Pap. 1878, v. 56, p. 4.
The contents of this paper, as well

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in Vic-
toria.

be paid out of the moneys standing to the credit of the consolidated fund.^e Meanwhile, in 1863, the colonial audit commissioners declined to sanction any further issues of public money until they were satisfied that such appropriations had been authorised by both houses of parliament.

Governor
would not
sanction
such a
step.

In the dilemma occasioned by these contrary opinions, Governor Bowen requested instructions from the Crown, and if necessary, an opinion from the Imperial Crown law officers for his guidance. Until otherwise directed, he should adhere to the conviction 'that the governor cannot sign warrants for the issue of money from the public treasury without the certificate of the audit commissioners that the money is "legally available."' Later on, in a despatch dated March 18, 1878, the governor repeated his request for an opinion, on this point, from the law officers of the Crown in England, in view of the change of practice in Victoria, since 1862, and the fact that the legislative council had recently 'laid aside' the appropriation bill.^f

Shortly afterwards the governor informed the secretary of state that his ministers had protested against his right to decline to follow their advice in matters of purely local concern, and also against his having sought for any other legal advice than that of the colonial law officers. In Australia, it is customary for the law officers of the Crown to be leading members of the cabinet; and so the rejection of their advice is equivalent to a rejection of the advice of the cabinet, which is a constitutional ground for the resignation of ministers. This makes 'the position of an Australian governor one of rare difficulty and delicacy.'^g In reply to this despatch, on July 5, 1878, Sir M. Hicks-Beach—while recognising the general obligation of a governor to follow the advice of his ministers in local matters, if only he refrains from sanctioning an illegal act—pointed out that a governor was responsible to the sovereign, whom he represents; and that, if called upon to justify the legality or necessity of any questionable proceeding, he could not shelter himself under the responsibility of his ministers. In all doubtful cases, a governor should require from the colonial law officers a written memorandum, certifying—as the authorised exponents of the law, and not in their capacity of political advisers—that no infraction of the law is involved in advice tendered to him. If they cannot certify this—whenever the governor is urgently pressed to sanction a doubtful act, or if he is unable to accept their interpretation of the law—his personal responsibility to the Crown

^e See Victoria Leg. Coun. Jour. 1877-78, pp. 205, 206. May, Parl. Prac. ed. 1888, p. 689.

^f Com. Pap. 1878, v. 56, pp. 773-780, 866.

^g *Ib.* p. 873.

may require that he should delay acting on the advice given, until he can decide 'whether the emergency is of that grave and urgent character which alone could justify him in consenting to perform the act advised, or whether he should inform his ministers that he must decline to do so, even at the cost of having to accept their resignation of office.'^h

Disputes
in Vic-
toria.

Anticipating somewhat the course of our narrative, it may be here stated that the law officers of the Crown in England reported, for the information of the governor, that money voted in committee of supply 'is not available until it has been appropriated by an act of the Victoria legislature.'ⁱ

On January 26, 1878, Governor Bowen addressed a further despatch to the colonial secretary, enclosing a copy of a memorandum which he had communicated to the premier, representing that certain acts which had been performed by ministers, and measures which they had advised—with a view to reductions in the public service, rendered necessary owing to the rejection of the appropriation bill by the legislative council—were illegal. In this paper—while acknowledging that he was bound to afford to his ministers for the time being all just and reasonable support, consistently with obedience to the law—the governor remarked that, if occasion should occur wherein it was 'clear to his judgment that the advice of his ministers involves a violation of law, in such a case it would doubtless be his duty to refuse compliance, and to endeavour to obtain the aid of other ministers.' This principle had been approved by her Majesty's government, who at the same time had disavowed any 'wish to interfere in any questions of purely colonial policy; and only desire that the colony should be governed in conformity with the principles of responsible and constitutional government, subject always to the paramount authority of the law.' Accordingly, the governor felt it to be his duty to request ministers to cancel forthwith certain notices in the 'Official Gazette,' dispensing with the services of certain judicial officers of various degrees; 'and every other act or notice whatsoever which has involved or may involve a violation of the law.' This firm and decided stand taken by the governor was duly responded to by his ministers, who promptly 'consented to retrace their steps in the manner proposed, and to limit themselves to making such reductions in the public service as to which they believed that no exception could be raised on the score of illegality.'^j

Governor
objects to
illegal
dismissals.

^h Com. Pap. 1878, v. 56, p. 905. see *ante*, p. 166.
In regard to law officers of the Crown in the double capacity of ministers, and of legal advisers, ⁱ *Ib.* p. 921. And see *post*, p. 734.
^j *Ib.* p. 800.

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in Vic-
toria.

Governor
defends
his
conduct.

On the same day as that on which the preceding despatch was written, Governor Bowen transmitted to the colonial secretary an address to her Majesty from the legislative council, reciting the recent events in this controversy, and accusing his excellency of grave dereliction of duty, in lending his authority and influence to coerce the legislative council in the performance of their proper functions, and in plunging colonial affairs into confusion. He forwarded, with this address, a memorandum from ministers, defending the governor from these aspersions, and also observations of his own, wherein he charged the legislative council with being responsible for the present 'dead-lock' and its results, inasmuch as they claimed to be practically supreme in the colony, and had refused to settle their differences with the assembly upon the basis of Imperial parliamentary precedent. He pointed out, furthermore, that it was in the power of the council to remove at once the existing confusion and uncertainty in the colony, by resuming amicable relations with the assembly, and confining themselves to the powers practically exercised by the house of lords in matters of finance.^k The governor likewise vindicated himself from the charges made against him in this address, urging that it was unconstitutional to hold him personally responsible for the acts of his ministers, and thereby to ignore his own especial duty—to maintain a strict neutrality in the differences which had arisen between the two houses.^l

On Feb. 18, 1878, Governor Bowen transmitted an address to the Queen from the legislative assembly, on the political condition of the colony. This address recapitulated the events which had led to the present crisis, and charged the legislative council with having thrown the affairs of the colony into distraction, by their persistent determination to exercise a control over public expenditure which had long ago been relinquished by the house of lords. The address furthermore proceeded to justify the proceedings of the governor and his ministers in this emergency.^m After passing the address, the assembly adjourned until March 5.

Three days later, the governor forwarded to the Queen a second address from the legislative council, vindicating their proceedings from the interpretation placed upon them by the aforesaid address from the assembly, and correcting certain erroneous statements therein. The council alleged that they had been compelled, on the four occasions on which they had rejected appropriation bills, to

^k But see the defence offered by the council in their address to the Queen, recorded in their Journals of Feb. 19, 1878.

^l Com. Pap. 1878, v. 56, pp. 801–

818. See also the governor's reply to an address of the leg. council, in their Journals of Feb. 19, 1878.

^m *Ib.* p. 885.

take this extreme course as the only means of asserting and maintaining their independence as a distinct branch of the legislature. They could only presume that the assembly desired to ignore or get rid of the second chamber, and of the restraints which it imposed upon the assembly, in their endeavour to exercise unlimited control over all measures involving the expenditure of public money. The council were now, as heretofore, ready to submit the differences as to the construction of the constitution act to the judicial committee of the privy council ; but the assembly would not consent to do so. They therefore, assured of their own loyalty to the Queen and constitution, protested against the conduct of the assembly, in seeking to authorise expenditure upon the authority of their own resolutions, without the sanction of the council.^o

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in Vic-
toria.

Very little business was done by the assembly after their re-assembling, until March 28, when the house being informed that the legislative council had agreed to a compromise, whereby the expiring law for the payment of members would be continued in a separate bill, the appropriation bill, which had been laid aside by the council, was again introduced, passed, and agreed to by the council.

Tem-
porary
agreement
between
the two
houses.

This grave and serious controversy being ended, for a time, the assembly just before the close of the session, on April 9, 1878, agreed to an address to Governor Bowen, expressing their appreciation of his impartial and constitutional attitude during this protracted conflict. They testified that his excellency had manifested, in his relations to parliament, to his ministers, and to the Crown, 'a constant desire to preserve to each its legitimate authority ; and, in after times, we doubt not the example which you have set, in a grave public emergency, will be cited as a model for constitutional governors.'^o

The governor, in his speech at the prorogation of parliament, stated that, during this protracted and memorable session (which lasted from June 26, 1877, to April 9, 1878),^p 'grave questions of constitutional rights and powers have arisen, and been debated and maintained [on the part of the legislative assembly] with inflexible resolution ; but I rejoice to add that a settlement has been ultimately found, not inconsistent with the principles of responsible

ⁿ Com. Pap. 1878, v. 56, p. 839.

^o Victoria Assem. Votes, 1877-78, v. 1, pp. 289-314.

^p It should be stated that the session actually began on May 22, which was the first day of a new parliament, but on that day no

business was done, except the election of a speaker, and his presentation to the governor. Both houses then adjourned until June 26, on account of a change of ministry on May 21, and to enable the new ministers to go for re-election.

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in Vic-
toria.

government and the spirit of the constitution. To avoid, however, the possibility of the recurrence of such a conflict in the future, my advisers will, with all possible despatch, prepare a measure to alter and amend the constitution statute.'⁴

Conduct of
Governor
Bowen
con-
sidered.

On April 11 the governor forwarded to the secretary of state a further address to himself, passed on the 2nd instant by the legislative council, together with his reply, and a ministerial memorandum on the subject. In this despatch, and in another dated April 12, Sir G. Bowen narrated the efforts he had made to restore harmony between the two houses, and enumerated the reasons which had actuated him in his endeavours, as a constitutional governor, to observe a neutral and impartial position during the continuance of this dispute. He also defended himself against the complaints urged by the legislative council, 'that he evinces partiality whenever he declines to obey their behests to overrule his responsible ministers.' The governor claimed that his policy had succeeded in bringing the parliamentary crisis to a close without a social and political convulsion. And that the outcry raised against him was akin to similar attacks upon other colonial governors, who had been 'assailed by beaten minorities, because they steadily supported ministries possessing the confidence of the majority of the colonial' assemblies.⁵

The news of the happy termination of this long-continued struggle reached the colonial office by telegram, just as the colonial secretary was about to write to Governor Bowen, to intimate his satisfaction at receiving explanations from his excellency in regard to his conduct in this trying emergency.⁶

Position of
a governor
in parlia-
mentary
disputes.

In reviewing the part taken by Governor Bowen during this political crisis, it is hard to conjecture what else he could have done to uphold the equilibrium of the state, or to restrain the excesses of either party in the contest. The difficulty began in a conflict between the legislative chambers concerning their respective constitutional rights. In this contest there was obviously nothing to warrant the authoritative interposition of the governor; and it was his duty to avoid any interference with either house whilst they were striving, within the lawful limits of parliamentary warfare, for the maintenance of their several rights and privileges. The only course open to a governor, under such circumstances, is one of friendly mediation between the contending parties. In conformity with British constitutional practice, which regulates the action of the sovereign towards the two houses of parliament, it is always becoming in a

⁴ Assem. Votes, 1877-78, v. 1, 881, 887.

p. 318.

⁵ *Ib.* p. 772. And see Hans. D.

⁶ Com. Pap. 1878, v. 56, pp. 878- v. 238, p. 1401.

governor to endeavour to restore harmony in the body politic.^t In this respect it is evident, from the correspondence laid before parliament, that Governor Bowen was not wanting, and that he left no efforts untried in this direction, which were compatible with his impartial and responsible position. As a last resort in such an emergency a governor is constitutionally competent to have recourse to the prerogative of dissolution, and to appeal to the constituent bodies, on the express ground of the existence of disputes between the legislative chambers which render it impossible for them to work together harmoniously. He may thus endeavour to arrive at some common basis of reconciliation and agreement, which would be ratified by public opinion.^u And if the ministry in power were not willing to become responsible for a dissolution, the governor would be competent and amply warranted, upon a reasonable conviction of the probable success of such an undertaking, in invoking the aid of other ministers, by whose assistance it might be practicable to restore a good understanding between the council and assembly, either with or without the necessity for an appeal to the people.^v

It would seem, however, that the alternative of a dissolution of parliament was not available in Victoria at this juncture. Adverting to an observation in an address of the legislative council at this period, that, if ministers would neither defer to the claims of the council or retire from office, they ought at least to appeal to the people, Governor Bowen alleged 'that the present ministry is supported by a majority of about two-thirds of the legislative assembly, and that there is no reason to suppose that this proportion would be materially altered by the dissolution of an assembly which is almost fresh from the country, having been elected only eight months ago.'^w Moreover, ministers at this particular time were restrained from advising a dissolution (a course which, if likely to succeed in bringing about a final settlement of the question at issue, they would unhesitatingly have approved) by the reflection that when, during a former contest between the two houses, a ministry supported by a large majority in the assembly obtained leave to appeal to the people by a dissolution of parliament, the council afterwards refused to abide by the result of the appeal.^x

Unable in this exigency to make use of the prerogative of dis-

^t See Todd, *Parl. Govt.* v. 2, p. 203, new ed. p. 251.

^u See Governor Weld's memorandum on this subject, in *Tasmania Leg. Coun. Jour.* 1877, sess. 2, App. No. 45. And *post*, 784.

^v See Todd, *Parl. Govt.* v. 2, p. 405, new ed. p. 504.

^w *Com. Pap.* 1878, v. 56, p. 811.

^x *Vict. Assem. Jour.* 1877-78, v. 1, p. 291.

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in Vic-
toria.

solution as a means of restoring unity in the body politic, Governor Bowen was confirmed in his conviction that he must adhere to the policy of absolute neutrality, lest the Crown in his person should be brought into direct antagonism with the assembly and with the people.^y

Lord Can-
terbury on
a gover-
nor's
position.

For the course ordinarily open to a governor, when he disapproves of the policy of his ministers, of transferring his confidence to other hands, was not available under existing circumstances. The end in view being not so much the adoption of a different policy in the administration of public affairs, as the restoration of harmony between the two houses, Governor Bowen recalled the sagacious words of his experienced predecessor, Lord Canterbury, uttered in reference to the parliamentary 'dead-lock' of 1867-68: 'It is the first duty of a governor to abstain from taking any step which would identify him with either or any of the contending political parties in the colony,' and 'the displacement of ministers, supported continuously by a majority of the lower house, is a step which could not properly be taken by the governor without a fair prospect, at least, of that success by which alone, as is admitted by all constitutional authorities, such an exceptional exercise of the prerogative can be justified. It has therefore been the duty of the governor throughout the parliamentary contests which have for some months impeded, and have now stopped financial legislation, to confine his endeavours to restore united action in the legislature within the limits prescribed by neutrality on the points at issue between the two houses, and by the constitutional right of an existing government to the fair support of the governor.' These observations of Lord Canterbury, which were entirely approved by the Imperial authorities, were regarded by Sir G. Bowen as equally applicable to himself on the present occasion, and as being in exact agreement with his own rule of conduct in past times.^z

Before proceeding to record subsequent events, which speedily fanned the embers of these vexatious contests into a fierce flame, mention should be made of one or two other points of interest, which claim our notice at this stage of our narrative.

Dismissed
officials
appeal to
supreme
court.

In Victoria, under the Crown remedies and liabilities act, 1865 (28 Vic. No. 241), a person who may feel himself aggrieved by any action of the government may seek redress from the supreme court, the decisions of which tribunal would of course be carried into execution by the civil authorities.

Accordingly, on February 9, 1878, application was made to the supreme court to test the legality of the proceedings of the Victoria

^y Com. Pap. 1878, v. 56, p. 811.

^z *Ib.* p. 880.

government to which we have already referred,^a in removing from office certain county judges, holding office 'during pleasure,' and whose salaries had ceased with the 'stoppage of supplies.' But the court refused to interfere, declaring that this point could only be properly disposed of by a writ of error.^b Ere long, as we shall presently see, the home government interposed, and called the attention of the governor to the highly objectionable character of the proceeding in question.

Disputes
in Vic-
toria.

Meanwhile, on April 10, 1878, a deputation of magistrates, merchants, and others, connected with the Australian colonies, waited upon Sir M. Hicks-Beach (the colonial secretary), to express their satisfaction at the temporary adjustment of the dispute between the two houses in Victoria, to point out the errors into which they believed Sir G. Bowen to have fallen during the continuance of the crisis in that colony, and to justify the action taken by the legislative council. In reply, the secretary of state expressed to these gentlemen his willingness to give a careful consideration to their statements, but declined to discuss with them the merits of the controversy in Victoria. He added that, 'if the action or advice or assistance of the home government should be desired by the colony, it will be most readily given.' Until then, 'it would be impossible for the home government to interfere.' While, 'as a general rule, the governor of a colony ought to act upon the advice of his responsible ministry,' he 'is placed in a position of great responsibility, difficulty, and isolation.' 'No one could wish to see him reduced to the position of a machine, or that his action should be merely that of a clerk, unable to decide on any particular matter until he received his instructions from Downing Street. We endeavour to make our colonial governorships positions of high dignity and considerable emoluments, in order to obtain the services in those positions of capable men—men who are able and ready to act for themselves with clear-sightedness, firmness, and wisdom in any emergency.' Such men are entitled to great confidence, and their acts should not be hastily criticised and until we are fully acquainted with all the facts. If hereafter 'it should appear that in any point Sir George Bowen has been properly to blame, I shall not hesitate to express my opinion upon it.'^c

Colonial
secretary
appealed
to against
the
governor.

In acknowledging the receipt of the addresses to the Queen from both houses of the Victoria parliament, Sir M. Hicks-Beach, in his despatches of April 24 and 30, expressed himself to the same

^a See *ante*, p. 725.

^b Com. Pap. 1878, v. 56, p. 826—

^c *Ib.* pp. 846–854, and see p. 909.

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in Vic-
toria.

effect, with a general though guarded approval of the conduct of Governor Bowen.^d

Appropriation
of
colonial
funds
under
Imperial
statute.

On March 17, 1878, Governor Bowen reported to the secretary of state a decision of the legislative assembly upon a curious point, elsewhere noticed,^e namely, that under the forty-fifth section of the Victoria constitution act, authority was given for the appropriation of so much of the consolidated revenue of the colony as might be necessary to defray the charges incident to the collection, management, and receipt thereof, without the need of a parliamentary vote on this behalf. The law officers of the Crown, the audit commissioners, and certain eminent lawyers in Victoria, disconnected with party politics, had all concurred in this interpretation of the Imperial statute. Ministers had, accordingly, advised the governor to sign a treasury warrant authorising the resort to this mode of providing funds to maintain 'establishments absolutely necessary for the protection of life and property in this colony' during the 'stoppage of the supplies.' Assuming this to be 'an affair of purely colonial concern, and not repugnant to the law and to the constitution,' the governor agreed to take this course, should it prove to be impossible to arrive at an amicable arrangement of the differences between the two houses, by the passing of the annual appropriation bill.^f The legislative council, however, protested against this novel proceeding, and contended that it was based upon a misconstruction of the Imperial act.^g Luckily, the amicable settlement of the parliamentary 'dead-lock' rendered it unnecessary to adopt this extraordinary method of obtaining the 'legal issue' of public money.^h

But before an amicable understanding had been come to, the governor had applied to England for advice upon this question, as well as upon the question whether resolutions adopted by the assembly in committee of supply sufficed to render 'legally available' for public expenditure money in the public chest. Both these queries were answered by the secretary of state, in a despatch dated August 17, 1878. As regards the interpretation to be put upon the Imperial act 18 & 19 Vic. c. 55, sec. 45, the law officers of the Crown were of opinion that the moneys necessary to defray the costs, charges, and other expenditure mentioned in that section were legally available without further parliamentary warrant, being, in fact, specifically appropriated by the Imperial statute. But that money merely voted in committee of supply was not available, until

^d Com. Pap. 1878, v. 56, pp. 854, 855.

^e Com. Pap. 1878, v. 56, pp. 856-866.

^f See *ante*, p. 219.

^g *Ib.* p. 884.

^h *Ib.* p. 920.

it had been specifically appropriated to the intended purpose by an act of the Victorian legislature.ⁱ

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toria.

Replying to this despatch on October 16, 1878, the governor expressed his satisfaction at learning that he had been right in his intended sanction of the ministerial advice, that he should sign warrants for the issue of public money under the forty-fifth section of the constitution act as aforesaid ; and also in refusing to sign warrants at the request of ministers for any other treasury advances except by authority of a colonial statute.^j

After the crisis of 1878 had terminated, and the appropriation bill had become law, steps were immediately taken to reinstate certain public officers in the judicial and civil departments who had been dismissed on account of the 'stoppage of the supplies.' Nearly all the judicial and legal officials were replaced, but ministers decided to take this opportunity to reduce an overgrown and costly civil service, and to reinstate 'only such officers as are required for the proper working of the civil service, while the remainder shall receive the liberal pensions, superannuations, and other compensations for loss of office provided by law.'

Dismissed
officials
replaced.

The governor, both now and at a later period, remonstrated with his ministers on this matter. He urged them to consent to a general reinstatement of all civil service employes whose services had been dispensed with pursuant to the ministerial memorandum of January 8, 1878 ; but, this being a local and not an Imperial question, the governor did not claim to interfere with authority. He simply expressed an earnest hope that ministers would deal equitably, wisely, and liberally in the case. Ministers, however, in a communication dated May 6, stated that they did not consider a general reinstatement of all officers who had been discharged to be advisable. The course they had taken had been approved by the assembly. They insisted, moreover, 'that the mode of dealing with the civil service of Victoria is purely a matter of Victorian concern,' and that, irrespective of any interference or suggestion on the part of the governor, they had 'the exclusive right of dealing with it on their own responsibility.' Being himself persuaded, however erroneously, that ministers had ample authority for this position, his excellency undertook to defend it in a despatch to the secretary of state, dated May 8, 1878.^k

Subsequently, a Mr. Gaunt, a police magistrate whose services had been dispensed with at this juncture, petitioned the Queen for

ⁱ Com. Pap. 1878, v. 56, p. 921. see also Victoria Assem. Votes,

^j *Ib.* 1878-79, v. 51, p. 491. 1879-80, v. 2, No. 43.

For the contents of this paper, ^k *Ib.* 1878, v. 56, p. 894.

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toria.

Legality
of official
dismissals

ques-
tioned by
Imperial
govern-
ment.

redress. This petition, as required by the colonial regulations (c. 7, sec. 6), was duly forwarded through the governor. In reply, his excellency was requested to notify Mr. Gaunt that the secretary of state had been unable to advise her Majesty to take any action in the matter, it being one which, under the colonial constitution, was within the jurisdiction of the governor and his executive council. The governor afterwards reported that Mr. Gaunt, upon formal application, had received the compensation for loss of office to which he was legally entitled.¹

In answer to the aforementioned despatch from Governor Bowen of May 8, 1878, Secretary Sir M. Hicks-Beach, in a despatch dated August 25, while disclaiming any desire to encroach upon the responsibility of the local ministers in matters within their peculiar jurisdiction, animadverted upon the personal responsibility which attached to the governor in approving the advice given as to the partial reinstatement of civil servants who had been removed from office in January last.

The question was undoubtedly within the discretion of the local government ; that is to say, of the governor acting by and with the advice of his ministers. In all questions of a local nature the governor would, as a general rule, be guided by the advice of his ministers ; but he has a right to discuss with them any topic that may arise, and to express freely his opinions and suggestions thereon. Under ordinary circumstances, if satisfied as to his duty to the law or the constitution, the governor would follow, as of course, the advice received, and his action would not come under the review of her Majesty's government.

' But it is very obvious that the recent removal from office of a large number of the civil servants of Victoria was no ordinary occasion, and involved constitutional principles of great importance not only to Victoria, but (as being a precedent) to all colonies living under constitutions granted by the Crown or by the parliament of Great Britain.' It is an element of these constitutions to uphold and secure a permanent civil service, only subject to removal by the executive government for specific misconduct, or to carry out a scheme of reductions which had been duly considered and approved by the legislature.

It is clear, however, that the case of the large number of civil

¹ Com. Pap. 1878, v. 56, pp. 902-908, 926. See also the case of Mr. G. Gordon, late chief engineer of water supply, who, having petitioned her Majesty against his alleged

wrongful dismissal by the minister of mines in Victoria, was, in like manner, referred back to the governor in council. Com. Pap. 1878-79, v. 51, pp. 537, 549.

servants discharged in Victoria had not been dealt with on these principles; but avowedly 'with a view to economise the funds at the disposal of the government,' and to enable them to surmount a serious financial difficulty, which has since been wholly removed by the passing of the appropriation act.

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toria.

It therefore became the duty of the governor, before consenting to this transaction, to satisfy himself that the proposed proceeding was justifiable in the interests of the public at large. No claim to 'exclusive' responsibility on the part of ministers could relieve the governor of this obligation. He would have done better, in the opinion of the secretary of state, as well for the colony as in the maintenance of the principles of parliamentary government, had he notified his ministers that he felt unable to put his name to the documents directing the removal of these officers.

This course might have involved the resignation of the ministry. But it might also have led to the adoption of other and less objectionable means for surmounting the difficulty. If not, and if after their resignation it became necessary to recall the ministers to office, 'either on the failure of others to form an administration, or after a dissolution, it would have been of some advantage that an opportunity should have been afforded to the colony for the full and serious discussion of the step proposed.'

This frank expression of opinion in regard to the course he should have pursued was not intended as a censure upon Sir George Bowen, whose long and distinguished public career, and whose strenuous efforts to settle the serious dispute between the two houses in Victoria, were highly appreciated by her Majesty's government.^m

Before the receipt of this despatch, Sir G. Bowen, on June 29, 1878, had written to the secretary of state that, while the removal of so many judicial and civil officers had not been declared illegal by any competent colonial authority, although the question had been twice considered by the supreme court, on a test case, to try the legality of the act of government in removing the county-court judges, on the plea that they did not hold office during pleasure, which had resulted in the dismissal of the complaint, a majority of the court holding that these functionaries were removable at the pleasure of the Crown, he had always considered these removals to be objectionable both on legal and on constitutional grounds; 'but that, after anxious consideration and careful searching for precedents, he believed that they would prove a less formidable evil than the practical dismissal of a ministry possessing an overwhelming

Governor
Bowen's
defence to
colonial
secretary.

^m Com. Pap. 1878, v. 56, p. 923.

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majority in the assembly and in the constituencies, and the consequent endangering of the internal tranquillity of the colony, and of its existing happy relations with the Imperial government.'ⁿ

In fact, owing in great measure to the restraints put upon the aggressive action of his ministers by Governor Bowen, only sixty individuals were permanently displaced, out of a civil service numbering 1,626 persons; and these individuals received 45,000*l.* in compensation for the loss of office, and 3,500*l.* in annual retiring allowances. Moreover, the civil service of Victoria was notoriously overgrown, and there had long been a demand for its reduction, and especially for the removal of certain incompetent and superfluous officials. Had parliament been dissolved upon this question, Governor Bowen believed that it would have strengthened ministers, and reduced the small band of the opposition. In this event, there was reason to fear that the entire civil service would have been dismissed and replaced, after the American fashion, by partisans of the Berry administration.

In a further despatch, dated November 22, 1878, Governor Bowen replied to Sir M. Hicks-Beach's despatch of August 25. His term of service in Victoria having nearly expired, and he being about to assume another governorship, he took occasion to recount the leading events of his administration, and to explain the principles which had actuated him in his government of the colony, during the continuance of the existing difficulties.

He remarks in this despatch, that Mr. Berry's ministry was 'the most powerful ministry hitherto known in Australia,' and that 'it was universally agreed that so strong was the feeling in the country during the late parliamentary crisis that a dissolution on the question of the reduction in the civil service could have had no result but to restore Mr. Berry and his friends to power, with greatly increased strength, and regarding the governor "as an aggressor and beaten foe," and thus deprive him of the moderating influence by the use of which I have been able to avert many evils.' Sir G. Bowen adds: 'It would be an act of perilous infatuation in any colonial governor to remove, solely because he personally disagreed with them on a measure of colonial policy, not repugnant to law nor to Imperial interests, a ministry trusted by parliament; unless indeed he were well assured that he would be able to replace them, either before or after a dissolution, by a new ministry, commanding at least a working majority.'

ⁿ Com. Pap. 1878, v. 56, p. 925. And *ib.* 1878-79, v. 51, pp. 478-490.

While admitting it to be the paramount duty of a colonial governor to carry out, loyally, his instructions from her Majesty's secretary of state, Governor Bowen begged leave respectfully to represent that he had pursued, under very trying circumstances, as he believed the only possible course, and one most in harmony with the spirit of his instructions, and with the precedents established by other governors throughout the Queen's dominions.

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in Vic-
toria.

In a postscript to this despatch, Governor Bowen explains that he had, on a former occasion, conveyed a wrong impression to the colonial secretary, in representing that his ministers deemed his action 'in even questioning the course taken with regard to' the dismissal of certain public officers as being, 'to some extent, an interference with the due course of responsible government.' Ministers had requested him to state that they 'entirely disclaim' any such opinions. In fact, 'they have never resisted my constant practice of discussing with them, as with all preceding ministers, all public topics whatsoever, and of recommending the withdrawal or modification of all measures which I may deem objectionable. They have always been ready to defer to my opinion on matters of Imperial interest, and also (I may add) on many questions of local policy, in which they were not fettered by convictions previously expressed, or by party and parliamentary exigencies.'^p

The
governor
and his
ministers.

The secretary of state, in replying to this despatch, on February 17, 1879, expresses his regret that the arguments therein contained had not sufficed to change his opinion in disapprobation of Governor Bowen's conduct in respect to the removal of the judicial and civil servants in Victoria. A non-compliance with the advice of his ministers, on this occasion, would not necessarily have led to their resignation, and might have induced them to agree to a less objectionable measure to meet the temporary financial difficulty. His excellency's despatch, however, with the other papers on the subject, should be published, as being explanatory of the views and principles which had governed his actions in a position of much difficulty. The assurance that the Victorian ministers disclaimed the opinion that the action of the governor, in questioning the course they had taken in this matter, was an interference with the due course of responsible government had been received by the secretary of state with much satisfaction.^q

Colonial
secretary
on the
governor's
conduct.

Sir M. Hicks-Beach conveyed to Governor Bowen, in this despatch, his desire that the voluminous correspondence in reference to the constitutional question in Victoria should now close. In

^p Com. Pap. 1878-79, v. 51, pp. 498-504.

^q *Ib.* pp. 531, 532.

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toria.

fact, before the final despatch from the secretary of state could reach Sir George Bowen, his successor had arrived, and he himself had received another appointment, as governor of Mauritius. It will be necessary for us, however, to retrace our steps, and note the new phase which this great controversy assumed, upon the reassembling of the Victorian parliament.

Proposed
amend-
ment of
Victorian
constitu-
tion.

On July 9, 1878, the second session of the ninth parliament of Victoria was opened by his excellency Sir George Bowen. In the speech from the throne, mention was made of the disputes between the two houses in the interpretation of their several powers under the constitution act, whereby, on four distinct occasions, the machinery of legislation had been brought to a standstill ; and an amendment to the constitution was suggested, as essential to the final adjustment of the legislative functions of the council and the assembly.

On July 17 a ministerial bill for this purpose was submitted to the assembly by Mr. Berry, the premier. It proposed that all money and tax bills passed by the assembly, if not concurred in by the council within one month, should be deemed to have received the assent of that house, and should be presented to the governor for the royal assent ; and that all other bills passed in two consecutive sessions by the assembly shall, if rejected by the council, in like manner become law—except that, at the request of the legislative council, any such bills may be submitted to a popular vote of the electors of the assembly, and, if approved at a general poll, shall be tendered for the royal assent.*

In despatches dated October 31 and November 28, 1878, Governor Bowen reported to the secretary of state that the two houses of parliament had been unable to agree upon the foregoing or any other measure of constitutional reform. The further consideration of the question had accordingly been postponed until the next session, to be held in the summer of 1879. Meanwhile, a parliamentary delegation, which should include the premier (Mr. Graham Berry), would proceed to England to confer with her Majesty's government on the subject.^a

The legislative council at this session did not refuse to pass the appropriation bill, although it contained an item granting 3,000*l.* to defray the expense of the proposed delegation. But they addressed a protest and a manifesto to the governor against the mission and its professed object, in which they vindicated the course they had pursued since the introduction of responsible

* Com. Pap. 1878-79, v. 51, pp. 457-475.

^a *Ib.* p. 491.

government, and justified their opposition to the plans of the dominant party in the assembly. They deprecated the adoption of any measure which would destroy the present constitution of Victoria, and substitute one legislative chamber for two; and they urged that the intended reform bill should be first submitted to the constituencies of the assembly for their verdict thereon before it was decided upon in the local parliament. The attorney-general, however, advised the governor that this protest did not in any degree invalidate or hinder the proposed delegation which would be sent on behalf of the executive government and with the sanction of the assembly.^t

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in Vic-
toria.

Parliament was prorogued on December 6, 1878. The session had not been unproductive of useful legislation; but no progress had been made towards the solution of the important question of constitutional reform. In the closing speech from the throne reference was made to the ministerial deputation to confer with the Imperial authorities respecting existing defects in the constitution act, with a view to the satisfactory adjustment of the relations between the council and the assembly.

Unsatis-
factory
relations
between
the two
houses.

In contravention of the remonstrance from the legislative council, the governor was requested by ministers, in December, 1878, to solicit attention to an address from the assembly to the Queen, adopted in the preceding February, wherein would be found the view of the situation entertained by that chamber. In this address the council was charged with reckless and unconstitutional proceedings in endeavouring to limit 'the exclusive right to initiate taxation and appropriation' which constitutionally appertains to the assembly, while the legislative council are expressly debarred from amending any such measures. The address further states that, in spite of repeated remonstrances, the council 'persist in claiming and attempting to exercise a power in financial questions far beyond that exercised by the house of lords.' And that, in reflecting upon the conduct of the governor during the continuance of this crisis, the legislative council had ignored fundamental constitutional maxims which assign to the sworn councillors of the Crown the responsibility for all public acts of a sovereign or a governor, and refuse to place any personal or individual responsibility for the same on the Crown or its representative.^u

At the same time the governor transmitted to the secretary of state a ministerial memorandum commenting upon the aforesaid manifesto from the legislative council. This memorandum alleged

^t Com. Pap. 1878-79, v. 51, pp. 505-516, 527, 528.

^u *Ib.* p. 516.

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toria.

that the council, since its establishment in 1854, had obstructed general legislation by rejecting over eighty bills, and so amending upwards of twenty others that they had been abandoned by the assembly. It pointed to the absolute need of a radical reform in the constitution of the council as the only means of bringing it into harmony with the assembly; and it declared that the proper functions of a second house were 'to offer counsel and to give time for deliberation'; while both counsel and delay would be most readily appreciated if it was understood that resistance had its limit and could not be protracted beyond a definite period.^v

Minis-
terial de-
putation
to
England.

It was in anticipation of the resolve of the legislative council to refuse their assent to the government scheme for the amendment of the constitution act that the local ministry had concluded to despatch two of their number to England, to obtain an act of the Imperial parliament to amend the constitution in the direction above explained. So far back as on August 6, 1878, Governor Bowen forwarded to the secretary of state, but without comment, a ministerial memorandum in which this determination was expressed.

Sir M. Hicks-Beach, in a despatch dated October 1, 1878, written for the information of ministers, plainly stated that, in his opinion, no sufficient cause had yet been shown for the proposed intervention of the Imperial parliament. However justifiable as a last resort, and as the only way to give effect to the deliberately expressed will of the people of Victoria, it is evident that the present proposal is altogether new and includes changes, such as the plébiscite, which has never been directly submitted to the constituencies at a general election. Under these circumstances the rejection of this scheme by the legislative council would not justify so exceptional a course as an application to the Imperial parliament to alter, without the previous assent of the Victorian legislature, a constitution originally framed in the colony, and merely confirmed by an Imperial act.

The secretary of state, however, expressed his willingness to receive any deputation on the subject, hoping to be able to agree with them upon certain principles, as a basis for the future settlement of this difficult question, which might prove generally acceptable to all parties.^w

This despatch did not arrive until after the question had been disposed of by the Victoria assembly. It was at once published,

^v Com. Pap. 1878-79, v. 51, pp. Years of Eng. Const. p. 165.
519-526. And see Amos, Fifty ^w *Ib.* pp. 475-477.

however, in the 'Official Gazette.' Governor Bowen, in a despatch of December 27, 1878, declared his entire agreement in the opinions therein expressed, and stated it to be his own conviction that public opinion in Victoria was still undecided on the subject, though inclining to a reaction against extreme views on either side. In one respect, however, he thought the intended mission was satisfactory. A few years ago, the assembly had vehemently repudiated the idea of Imperial interference, regarding it as an infringement of the rights of local self-government, whereas now the counsel and aid of the Imperial government is directly invited.

Disputes
in Vic-
toria.

Believing that a spirit of compromise and of mutual forbearance was essential to the harmonious working of two deliberative chambers, Governor Bowen was also inclined to think that a nominated second chamber was preferable to one constituted upon the elective principle. He was of opinion that the adoption of the nominative system, with certain restrictions and safeguards, would ultimately be accepted in Victoria, as the best practicable escape from past difficulties and dangers. A nominated chamber would never claim to be 'a second house of commons,' but would naturally imitate the wisdom and forbearance of the house of lords, in its attitude towards, and transactions with, the other house of the Imperial parliament. And with authority to the executive government to add fresh members, in extreme cases, a nominated chamber would be endowed with a safety-valve against prolonged collisions, analogous to the power of dissolving the popular chamber. Sir George Bowen's convictions on this subject were the result of long experience in colonial governments, and were confirmed by his belief that, in colonies possessing a nominated upper house, there had never been any serious collisions between the two chambers.*

Constitu-
tion of
legisla-
tive
council.

Soon after the close of the session, the ministerial delegation, consisting of Mr. Graham Berry (the premier) and Mr. C. H. Pearson, proceeded to England. Upon their arrival, Mr. Berry wrote to the secretary of state for the colonies, referring to his despatch, above mentioned, of October 1, 1878. This despatch did not reach Victoria until after the prorogation of parliament, otherwise it would have received consideration in parliament. The electorate in Victoria were agreed as to the necessity for a reform which should empower the representative chamber to give effect to the will of the people, without being controlled, as at present, by the veto of the upper house. Ministers had therefore decided to apply to the Imperial parliament for an alteration of the 60th section of the constitution act, so as to enable the legislative assembly to

Victorian
delegation
in
England.

* Com. Pap. 1878-79, v. 51, pp. 529-531.

Disputes
in Vic-
toria.

enact, in two consecutive sessions, with a general election interven- ing, a measure for the reform of the constitution. Such an amend- ment was urgently needed, as it is believed that no ministry can carry on the Queen's government satisfactorily in Victoria if some solution to the present difficulties be not provided.

Departure
of
Governor
Bowen.

On January 25, 1879, Governor Bowen addressed another de- spatch to the secretary of state, wherein he referred to his official career in Australasia during the past twenty years as governor, in succession, of three great colonies, and to his inflexible adherence, whilst in Victoria, to the constitutional rule of giving a fair and just support, in all matters not repugnant to law or to Imperial interests, to his ministers for the time being. He also declared his belief that a reaction had commenced in the colony against the violence of extremists on both sides, which would eventually compel an amicable settlement of the present controversy.

On February 21, the day before he left for his new government (the Mauritius), Sir George Bowen sent final despatches to the colonial secretary, enclosing copies of numerous farewell addresses, from various parts of Victoria, expressing approval of his public conduct, and regret at his departure.

Imperial
despatch
on the
Victorian
disputes.

Frequent conferences were held at the colonial office in London between the Victorian delegates and the secretary of state, and the result of these deliberations was embodied in a despatch addressed to the Marquis of Normanby, who replaced Sir G. Bowen as governor of Victoria.^y A copy of this despatch was confidentially communi- cated beforehand to Mr. Berry for the information of the delegates. The great importance of this state paper as an expression of the views of her Majesty's government upon the leading points of difference between the two houses in Victoria, justifies us in pre- senting it to our readers without abridgment. It is as follows :—

Downing Street : May 3, 1879.

MY LORD,—In his despatch of December 27, 1878,^z Sir George Bowen informed me that the legislative assembly of Victoria had authorised Mr. Graham Berry, the chief secretary and prime minister, and Mr. Pearson, a member of the assembly, to proceed to London, as commissioners or delegates, to solicit my advice and assistance, and to lay before me the views on the political affairs of Victoria entertained by the majority of the assembly ; and by the same mail he forwarded to me a statement that had been adopted by the council, and other documents bearing upon the case. Shortly after the arrival of Mr. Berry and Mr. Pearson in England, I received

^y Com. Pap. 1878-79, v. 51, p. 556.

^z *Ib.* p. 529.

them at this office, and Mr. Berry then left with me the letter, of which I enclose a copy. The objects of their mission have been since fully discussed between us at several interviews, and I will now proceed to convey to you the opinion which her Majesty's government have formed upon the important question at issue, after full consideration of the statements that have been placed before them on behalf of the government and assembly of Victoria on the one side, and of the council on the other.

Imperial
despatch
on
Victoria
disputes.

In a memorandum dated August 6, 1878, Sir George Bowen's ministers had anticipated that they might be 'compelled to despatch to England, on behalf of and with the express sanction of the legislative assembly, commissioners chosen from leading members of that house, to lay before her Majesty's Imperial government the matured result of its deliberation' on constitutional reform, 'with a view to get that result embodied in an act of the Imperial legislature.' On the receipt of that memorandum I lost no time in placing before the Victorian government the considerations which disposed me to the opinion that no sufficient cause had been shown for the intervention of the Imperial parliament in the manner suggested.

The request urged by Mr. Berry, in his letter of February 26, that parliament should, 'by a simple alteration of the sixtieth section of the constitutional act of Victoria, enable the legislative assembly to enact, in two distinct annual sessions, with a general election intervening, any measure for the reform of the constitution,' is, in my opinion, even more open to objection than the proposal I understood him to convey in his memorandum of August 6. But it is not necessary to discuss the merits of this or any other proposal, for, though fully recognising the confidence in the mother country evinced by the reference of so important a question for the counsel and aid of the Imperial government, I still feel that the circumstances do not yet justify any Imperial legislation for the amendment of that constitution act by which self-government in the form which Victoria desired was conceded to her, and by which the power of amending the constitution was expressly, and as an essential incident of self-government, vested in the colonial legislature with the consent of the Crown. The intervention of the Imperial parliament would not, in my opinion, be justifiable, except in an extreme emergency, and in compliance with the urgent desire of the people of the colony when all available efforts on their part had been exhausted. But it would, even if thus justified, be attended with much difficulty and risk, and be in itself a matter for grave regret. It would be held to involve an admission that the great colony of Victoria was compelled to ask the Imperial parliament to resume a power which, desiring to promote her welfare and

Imperial
despatch
on dis-
putes in
Victoria.

believing in her capacity for self-government, the Imperial parliament had voluntarily surrendered, and that this request was made because the leaders of political parties, from a general want of the moderation and sagacity essential to the success of constitutional government, had failed to agree upon any compromise for enabling the business of the colonial parliament to be carried on.

It is, nevertheless, important that the question should be settled as soon as possible where it can properly be dealt with—that is, in the colonial parliament; and I shall be glad if, by the observations which I am about to make, I can remove some part of the misunderstanding which has been amongst the chief obstacles to such a settlement.

Following the generally accepted precedent, the constitution act of Victoria established two legislative chambers—the council and assembly—and laid down, to a certain extent, their mutual relations; of which, it appears to me, a better definition rather than an alteration is now required. For, as no party in Victoria desires to abolish the council, I feel confident that there can be no wish, in the words of your ministers, to ‘reduce it to a sham,’ or, by depriving it of the powers which properly belong to a second chamber, to confer on the assembly a complete practical supremacy, uncontrolled even by that sense of sole responsibility which might exert a beneficial influence on the action of a single chamber. Nor can I suppose that the extreme view of the position of the council, which it has recently to a great extent itself disclaimed, can be supported by any who have sufficiently examined the subject.

The recent differences between the two houses of Victoria, like the most serious of those which have preceded it, turned upon the ultimate control of finance. I observe that the address of the legislative assembly of February 14, 1878, dwells almost exclusively on the necessity of securing to that house sufficient financial control to enable adequate supplies to be provided for the public service, and it is prominently urged in Mr. Berry’s letter of February 26, in proof of the necessity for finding some solution of the present constitutional difficulty, that ‘scarcely a year passes but it becomes a question whether the supplies necessary for the Queen’s service will be granted.’ But this difficulty would not arise if the two houses of Victoria were guided in this matter, as in others, by the practice of the Imperial parliament, the council following the practice of the house of lords, and the assembly that of the house of commons. The assembly, like the house of commons, would claim and in practice exercise the right of granting aids and supplies to the Crown, of limiting the matter, manner, measure, and time of such grants, and of so framing bills of supply that these

rights should be maintained inviolate ; and as it would refrain from annexing to a bill of aid or supply any clause or clauses of a nature foreign to or different from the matter of such a bill, so the council would refrain from any steps so injurious to the public service as the rejection of an appropriation bill.

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despatch
on dis-
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Victoria.

It would be well if the two houses in Victoria, accepting the view which I have thus indicated of their mutual relations in this important part of their work, would maintain it in future by such a general understanding as would be most in harmony with the spirit of constitutional government. But, after all that has passed, it may be considered necessary to define those relations more closely than has been attempted here, and this might be effected either by adopting a joint standing order, as was proposed in 1867, or by legislation. Of these, the former would seem to be the preferable course, for there might be no slight difficulty in framing a statute to declare the conditions under which one house of parliament, in a colony having two houses, should exercise or refrain from exercising the powers which, though conferred upon it, must not always be asserted. But I must add that the clearest definition of the relative position of the two houses, however arrived at, would not suffice to prevent collisions, unless interpreted with that discretion and mutual forbearance which has been so often exemplified in the history of the Imperial parliament.

If, however, it should be felt that the respective positions of the two houses in matters of taxation and appropriation can only be defined by an amendment of the constitution act, there may be other points—such as the proposal to enact that a dissolution of parliament shall apply to the legislative council as well as the assembly—that might usefully be considered at the same time ; but I refrain from discussing them now, feeling that their merits can best be appreciated in the colony itself.

It has been urged that some legislation is necessary to ensure mechanically the termination, after reasonable discussion and delay, of a prolonged difference between the two houses upon questions not connected with finance. I do not yet like to admit that the council of Victoria will not, like similar bodies in other great colonies, without any such stringent measure, recognise its constitutional position, and so transact its business that the wishes of the people, as clearly and repeatedly expressed, should ultimately prevail ; nor have I yet seen any suggestion for such legislation which I can deem free from objection.

I hope that the views which I have expressed may not be without influence in securing such a mutual agreement between the two houses as to remove any necessity for Imperial legislation ; and that,

Imperial
despatch
on dis-
putes in
Victoria.

as both parties profess to desire only what is reasonable, and as there has been now an interval for reflection, a satisfactory and enduring solution of the difficulty may be arrived at in the colony. The course of action which her Majesty's government might adopt, should this hope unfortunately be disappointed, must in a great degree depend upon the circumstances which may then exist ; but I can hardly anticipate that the Imperial parliament will consent to disturb in any way, at the instance of one house of the colonial legislature, the settlement embodied in the constitution act, unless the council should refuse to concur with the assembly in some reasonable proposal for regulating the future relations of the two houses in financial matters in accordance with the high constitutional precedent to which I have referred, and should persist in such refusal after the proposals of the assembly for that purpose, an appeal having been made to the constituencies on the subject, has been ratified by the country, and again sent up by the assembly for the consideration of the council.

I have, &c.,
(Signed) M. E. HICKS-BEACH.

The Most Honourable the Marquis of Normanby.

Should an
upper
house be
elected or
nominated ?

It will be observed that the preceding despatch, while it suggests a reasonable method of solving the constitutional question which had for so long a period distracted the public mind in Victoria, abstains from endorsing the opinion so emphatically expressed by Sir George Bowen, that a change in the composition of the legislative council by the adoption of the principle of nomination in lieu of that of election was desirable.

This omission is significant. It implies that in the judgment of her Majesty's government no such change would suffice to remedy existing evils, and to establish harmonious relations between the two chambers in Victoria. The experience of other British colonies, not only in Australia but elsewhere throughout the empire, does not corroborate Sir George Bowen's idea that colonies possessing a nominated upper house are exempt from serious disputes as to the relative rights and privileges of the two branches of the legislature, especially

in matters of supply. A nominated upper chamber, though undoubtedly preferable in certain respects to an elected body, constitutes no efficient or effectual check to democratic ascendancy; and it is obviously not in this direction that we may expect to find the point of agreement which shall reconcile the conflicting claims of colonial legislative bodies. New South Wales, the dominion of Canada, and Queensland severally possess a nominated upper house, and yet difficulties similar to those which have so long agitated Victoria are not unknown in these colonies.

Colonial
upper
chambers.

In Queensland, on October 3, 1866, the legislative council passed an address to the governor representing that the existing system of providing for the salaries and contingent expenses of their establishment, by an annual vote, was calculated to impair the dignity and independence of the legislative council as possessing co-ordinate jurisdiction with the popular chamber, and to provoke collisions between the two houses; that the legislative council ought to be exclusively empowered to form and control its own establishment—a right which is practically acknowledged in the Imperial parliament and in the colonies of South Australia, Tasmania, and Victoria, where the legislative council establishments are regulated by statutory enactments, and requesting his excellency to cause to be submitted to parliament a bill, based on the last estimates for such services, to make permanent provision for such expenditure. On October 17 the legislative council were informed that this matter would be earnestly considered by ministers during the recess.^a On July 25, 1872 (no change of practice having been meanwhile introduced), the legislative council passed another similar address to the governor, representing that for a

Disputes
in Queens-
land.

^a Queensland Leg. Coun. Jour. 1866, pp. 101, 123.

Legisla-
tive dis-
putes in
Queens-
land.

part of the current year no provision had been made for the necessary expenditure of their establishment, and urging the expediency of providing for the same by permanent enactment. No answer was reported to this address.^b

On September 2, 1875, the legislative council resolved that the making of any alteration in the estimates sent in for the official establishment of the council was a breach of its privileges. This resolution was transmitted to the governor, with a request that the amount required should be included in a supplementary estimate. On September 8 the governor replied that the matters involved in the preceding message would be considered by ministers during the recess and submitted to parliament next session.^c Pursuant to a report of the standing orders committee in September 1877, recapitulating the facts of the case, the legislative council of Queensland resolved to adhere to the claims asserted in the preceding addresses, the request therein not having been complied with. They accordingly passed another address to the governor recapitulating their complaint, setting forth that, under the constitution act, both houses were co-equal and co-ordinate in legislation, save only that the initiation of tax and appropriation bills was assigned to the legislative assembly; but that, nevertheless, the legislative council had acquiesced in practice to follow the tacit arrangement existing between the two houses of the Imperial parliament, only that the assembly must refrain from interfering by alteration with the necessary expenditure for the establishment of the council, an unwarrantable act which had been repeated during the present session.^d

^b Queensland Leg. Coun. Jour. 1872, pp. 60, 137, 771. And see *ante*, p. 710.

^c *Ib.* 1875, pp. 107, 117.

^d *Ib.* 1877, pp. 93, 102, 105, 190.

On November 1, 1877, the legislative council passed a new standing order, directing the preparation early in every session of an estimate of the sums required for salaries and contingencies of their establishment, the same to be forwarded by the clerk, when agreed to by the council, to the colonial treasurer. But on the first day of the next session the council was informed, by a letter from the governor, that, pursuant to the eighth section of the constitution act of 1867, his excellency disapproved of the same.^e Since then the legislative council have passed the resolution as a sessional order.^f

Legisla-
tive dis-
putes in
Queens-
land.

On October 11, 1876, the legislative assembly refused to concur in an amendment made by the legislative council to the stamp duties act amendment bill, because it repealed an existing tax, and the house was of opinion that 'the power of improving, varying, or repealing taxes should be maintained as the exclusive privilege of that house, which is elected by the people.' The legislative council insisted on their amendment, 'because this house fails to discover in the act constituting this legislature any provision giving such exclusive power to the legislative assembly.' The bill was accordingly dropped, and another bill was introduced, which became law.^g

In the assembly of New South Wales resolutions have been passed at the instance of the premier, in 1879, condemning the action of the upper house in repeatedly rejecting an important government measure, and to remedy this grievance it has been proposed to make that chamber elective.^h

The colony of New Zealand also possesses a nomi-

^e Queensland Leg. Coun. Jour. 1877, p. 135; 1878, p. 4. But see *ib.* pp. 77, 125.

^f *Ib.* 1879, sess. 1, p. 12.

^g *Ib.* 1876, pp. 77, 80, 167.

^h See *ante*, p. 658. The Colonies newspaper, Aug. 16, Sept. 13 and 20, 1879.

New
Zealand
upper
house.

nated legislative council, and hitherto no collision has occurred between the two chambers, since the introduction of representative institutions, which has led to any serious results. Nor is there any other special reason for altering the constitution of the upper chamber, although public opinion in the colony has seemed in favour at times of making the upper house an elected body. On September 18, 1878, a series of resolutions were submitted to the house of representatives, avowedly for the purpose of making the upper house more independent by changing its constitution from a nominated to an elective chamber. It was proposed to effect this alteration gradually as vacancies should occur in the council; such vacancies to be filled up by the election of members by ballot by the house of representatives, but so that the number of the legislative council should not exceed one-half of the number of the lower house. It was further proposed that when bills have been rejected in two successive sessions by either house, both houses should sit together and decide by a two-thirds vote of the united body upon the question whether such bills should pass and be presented for the sanction of the Crown. Ministers, however, disapproved of this scheme. The attorney-general said 'he was opposed to an elected upper house, and believed that it would become the greatest curse to our constitution.' He had always thought 'that by having a nominated legislative council and by having the number of its members unlimited, there was always an available power under the constitution act, which would prevent a dead-lock. Without such a power, collisions will always occur,' as we see in other colonies. After a debate the previous question was put on these resolutions and negatived.¹ But in

¹ New Zealand Parl. Deb. v. 29, p. 246. See also Sir D. Wedderburn's paper on 'Second Chambers,' which, in the light of Australian ex-

the following year the Grey administration went out of office. In opposition they advocated the total abolition of the legislative council, but the new premier (Mr. Hall), in an address to his constituents on May 26, 1881, announced his preference for a reform of the upper chamber in accordance with the resolutions proposed in September 1878.^j He reiterated this opinion in the house on August 3, 1881, in debate on a motion (which did not pass) in favour of making the legislative council elective. At the opening of the parliamentary session on June 14, 1883, the opinion was expressed, in the speech from the throne, that the time was drawing near when an elective might be substituted for a nominated upper house. On September 5, just before the close of the session, ministers laid upon the table in both houses a bill to alter the constitution of the legislative council. They proposed that the bill should be read during the recess, discussed next session, and disposed of then or in the following year, after the country had been consulted upon it.^k No change, however, was effected, as a special committee appointed to revise the constitution of the council reported that it could not agree.^l In 1891, when the legislative council bill was before the house of representatives, an amendment to make the upper house elective was lost.^m

New Zealand upper house.

Stringent measures of reform, designed to restrain the freedom of elective legislative councils, have been

perience, deprecates the introduction of the elective principle into the upper house, as being calculated to increase the risk of collision with the popular chamber, and to render a collision more serious when it takes place. *Nineteenth Century*, July 1881, p. 62.

^j The Colonies, Aug. 13, 1881,

p. 7.

^k New Zealand Parl. Deb. v. 46, pp. 582, 601.

^l New Zealand Deb. v. 53, p. 46.

^m This bill became law, Statutes 1891, No. 25. Under this act members are appointed for seven years, and may be reappointed.

Legisla-
tive dis-
putes in
the
colonies.

more or less entertained, not only in Victoria, but in two other colonies where an elective upper chamber exists; namely, in Tasmaniaⁿ and in South Australia.^o

In South Australia, by an act passed in 1881, the number of the legislative council was increased from eighteen to twenty-four, and the term of service reduced from twelve to nine years. When a bill passed by the assembly is rejected in two successive parliaments, it is made lawful (though not obligatory) for the governor to cause certain new members to be elected to the council, but the measure must necessarily be reserved for Imperial consideration.^p

We may, therefore, safely conclude that the true remedy for legislative disputes is to be found not in any change of tenure or in a formal redistribution of powers on the part of either house, but in the general acceptance by both houses of counsels of moderation, and in the avoidance by each of the assertion of extreme rights. It is to such a temperate and forbearing policy in the two houses of the Imperial parliament towards each other that their good understanding and cordial co-operation for so long a period is mainly attributable.

Victoria
constitu-
tion re-
form bill.

When the parliament of Victoria reassembled, in July, 1879, Mr. Graham Berry introduced into the legislative assembly a bill, as a government measure, to reform the constitution of the colony. This bill proposed to confer upon the legislative assembly absolute control over taxation and expenditure, and to provide that all public money should be available for appropriation immediately after it had been voted by the assembly.^q It also provided for the gradual sub-

ⁿ The Colonies, Aug. 16, 1879.

^o *Ib.* Aug. 30, Sept. 20, and Dec. 6, 1879. S. Australia Parl. Proc. 1879, Assem. Votes, v. 1, pp. 5, 58.

^p See S. Australia Parl. Proc. Nov. 18, 1881. Statutes 1881, No. 236.

^q But on the second reading of the reform bill, on Aug. 26, Mr. Berry intimated that he was prepared to abandon this clause. The Colonies, Oct. 18, 1879. He never-

theless persisted in taking a vote on this clause, but only carried it by a majority of one, after a very stormy debate. *Ib.* Jan. 31, 1880. Mr. Berry afterwards admitted that in England he found no encouragement for his scheme of a *plébiscite*. Leading liberal chiefs, equally with the conservative government, were opposed to it. The Colonies, April 17, 1880, p. 253.

stitution of a nominee legislative council in place of the present elective body; and that bills passed by the assembly and twice rejected by the upper house should be referred by the governor to a *plébiscite*, at which the decision of a majority of the people should be final, subject, however, to the assent of the governor. But the third reading of this bill having been voted in the assembly by forty-three members only, being one less than the absolute majority required by the constitution act,^r it was withdrawn. Ministers then advised a dissolution, to which the governor consented. The elections took place in February, 1880. They resulted in the defeat of the ministry, upon which the Berry cabinet immediately resigned, and were replaced by the Service administration.^s Parliament was originally summoned to meet on March 9, but was afterwards postponed until May 11. The new ministry immediately submitted to the assembly their measure for the reform of the constitution. It was a conservative scheme, but it did not prove acceptable to the house. The second reading of the bill was negatived by a majority of two on June 24. Whereupon Mr. Service applied to the governor for another dissolution of parliament, on the plea that the house did not fairly represent the feeling of the country, which was apparently favourable to his scheme of reform. The governor acceded to this request, believing that a speedy settlement of this vexed question was most desirable.^t But the Service ministry were not sustained by the constituencies. They resigned upon a vote of want of confidence soon after the meeting of parliament, and Mr. Berry was reinstated in office. He again submitted a reform bill, but it was denuded of the objectionable features of his original measure. It did not include provision for a *plébiscite*, nor aim at depriving the upper chamber of its constitutional powers. It mainly consisted of an attempt to render that house a more popular body, by abolishing property qualification and extending the electoral franchise.^u Important amendments to the bill were made in the legislative council, which were partially accepted by the assembly, and in June, 1881, the bill passed both houses. Upon the advice of ministers it was reserved for the consideration of the Crown, but the royal assent was afterwards declared.^v Under the new constitution none of the

Victoria
reform
bill.

^r Attorney-General O'Loughlen's opinion on this point, Victoria Assem. Votes, 1879-80, v. 1, c. No. 8. For further precedents of bills not proceeded with because they failed to obtain the concurrence of an absolute majority when required by law, see S. Australia Assem. Votes, 1880, p. 114.

^s The Colonies, Aug. 2, Sept. 20, Dec. 13 and 20, 1879, and Feb. 7 and March 6, 1880.

^t Victoria Parl. Pap. 1880-81, App. B, No. 6.

^u The Colonies, April 16, 1881, p. 261.

^v 45 Vic. c. 702.

Victoria
reform
bill.

objectionable and extreme features of Mr. Berry's scheme are sanctioned, but the number of members in the upper house is increased from thirty to forty-two ; they hold their seats for six instead of ten years. The qualification, both for members and electors, is considerably reduced. The legislative council retains the right to deal with money bills. These judicious reforms are mainly the embodiment of changes proposed to be made by the legislative council. Their acceptance was the result of a compromise between the rival parties in the assembly, and they indicate on the part of the people of Victoria a wholesome reluctance to sanction any extreme departure from the settled principles of colonial parliamentary institutions and of the usages of the mother country, as well as a disposition to settle their own political differences without the necessity for Imperial interposition.*

The defeat of the Berry ministry resulted from a vote of want of confidence passed on June 30, 1881, in the assembly, by a majority of three, a few days after the passing of Mr. Berry's bill for the reform of the constitution of the legislative council. Whereupon on July 4 Mr. Berry applied to the governor (Lord Normanby) for a dissolution of parliament. He based his request upon the fact that the existing parliament was elected under the auspices of the present opposition ; that it was elected on the single issue of reform, which had been satisfactorily disposed of ; that the very moderation of the reform act had alienated some of those who had been elected to support his ministry ; that there was good reason for believing that the country disapproved of this vote against ministers ; that unless ministers could strengthen their position by a dissolution a weak government and unstable government must succeed them. And therefore, agreeably to English precedent, they claimed the right to a dissolution. On the following day the governor replied to this minute by a memorandum, in which he declined to admit the principle advanced by ministers, that a premier's request for a dissolution must necessarily be complied with. If this principle were once admitted a vital blow would be struck at the power and independence of parliament. The minister would then become the master of parliament instead of the servant of the Crown. Alleging it to be the duty of the governor to act fairly and impartially between all parties, his excellency stated that—inasmuch as within about sixteen months two general elections had taken place, at the last of which the votes cast for both sides were very nearly equal, as the present parliament had not yet completed its first session, and

* See letter in London Times by Mr. F. W. Haddon, and comments of The Times thereon. of Aug. 19, 1881, upon settlement of the reform question in Victoria,

as there was no great question of public interest at issue between ministers and the house, so that the elections would mainly turn upon which party could obtain a majority—he must decline to accept the advice to dissolve until at least he should become convinced that by no other combination could the government of the colony be carried on. Accordingly, on July 5, ministers announced their resignation of office. By consent of parties, supply then pending was proceeded with, and ultimately passed. On July 12 Sir Bryan O’Loughlen, the leader of the opposition, announced that he had succeeded in forming a ministry. After a brief adjournment to admit of the re-election of ministers, parliament was prorogued on August 2. At the opening of the ensuing session it appeared that the new administration was strong enough to conduct the public business satisfactorily.^x

Dissolu-
tion
refused to
ministers.

The legislative assembly of Victoria sat in parliamentary session from April 25, 1882, to December 21, during which but little progress was made. More than one-fourth of the actual sitting time was consumed in discussing repeated motions, either of direct want of confidence, or having that end in view, and though a partial vote of supply was obtained, and the ministry uniformly upheld by large majorities, yet through the persistent efforts of certain members the necessary work of legislation was frustrated. On December 21 the assembly adjourned until February 13. But on January 26 ministers submitted to the governor a memorandum, representing the necessity for an immediate prorogation of parliament, with a view to its speedy dissolution. They stated that they had conducted the affairs of the country for over eighteen months, that the existing parliament would terminate in six months by effluxion of time, and that the opposition as well as the public in general were agreed in the opinion that the position of affairs in the house necessitates an appeal to the constituencies as the only and best solution of the existing difficulties. His excellency accepted this advice. Parliament was prorogued by proclamation on January 30, and shortly afterwards dissolved.^y

The O’Loughlen ministry retired, and was replaced by a coalition between the party of Mr. Service and that of Mr. Berry. At this juncture the new franchise for the upper house was brought into operation and a new assembly elected.

In concluding this section, it is unnecessary to comment any further upon the position of a constitutional

^x Victoria Parl. Deb. v. 36, 37; ditto Pap. 1880–81, No. 100.

^y *Ib.* Assem. Votes, 1882–83, v. 1, pp. 275–278.

Position
of a
governor.

governor upon the occurrence of differences between the legislative chambers. This point has been made sufficiently clear in our review of the preceding case. It has been therein shown that, so long as the two houses keep within the limits of the law, it is not the duty of the governor to interfere in discussions or disputes in regard to their relative powers and privileges, save only by advice or suggestions in the capacity of a mediator. Should these disputes become irreconcilable a governor may then authoritatively interpose, and, with the consent of his ministers, dissolve the parliament, and thereby bring public opinion directly to bear upon the question at issue and upon the parties to the contestation.

We will now proceed to consider the powers which appertain to a governor in the administration of this prerogative.

CHAPTER XVII.

PART III.

DISCRETION OF THE SOVEREIGN OR HER REPRESENTATIVE
IN GRANTING OR REFUSING TO MINISTERS A DISSOLU-
TION OF PARLIAMENT.

THE prerogative of the Crown to dissolve an existing parliament, and to summon for advice and assistance another parliament, which shall consist, so far as the popular chamber is concerned, of an assembly newly chosen by the constituent body, is one of immense utility in bringing into harmonious co-operation the several portions of the body-politic.

Preroga-
tive of dis-
solution.

This prerogative may be exercised by the sovereign at any time, subject only to the constitutional rule which, under parliamentary government, necessitates that it shall be advised and approved by a minister of state directly responsible to the house of commons.

The prerogative power of dissolving parliament has been aptly termed 'the most popular of all the prerogatives of the Crown, which can never be exercised except for the benefit of the people, because it makes them arbiter of the dispute'^a—appealing to them, in the last resort, to determine the policy which shall prevail in the government of the nation, and the minister by whom that policy shall be carried out.

^a Sir C. Gavan Duffy's minute to Governor Canterbury, Com. Pap. 1873, v. 50, p. 315.

Disso-
lution,
when and
how to be
exercised.

From the serious consequences which may follow the administration of this prerogative, it is manifest that it should be resorted to with great caution and forbearance. Frequent, unnecessary, or abrupt dissolutions of parliament inevitably tend to 'blunt the edge of a great instrument, given to the Crown for its protection;' and, whenever they have occurred, they have been fraught with danger to the commonwealth.

The personal sanction of the sovereign—after deliberate inquiry, and in the exercise of an unfettered judgment—must be given to the advice or recommendation of a minister, whenever it is proposed to have recourse to the prerogative of dissolution. 'Upon such an occasion, the sovereign ought by no means to be a passive instrument in the hands of his ministers: it is not merely his right but his duty to exercise his judgment in the advice they may tender to him; and though, by refusing to act upon that advice, he incurs a serious responsibility, if they should in the end prove to be supported by public opinion, there is, perhaps, no case in which this responsibility may be more safely and more usefully incurred than when ministers have asked to be allowed to appeal to the people from a decision pronounced against them by the house of commons. For they might prefer this request when there was no probability of the vote of the house being reversed by the nation, and when the measure would be injurious to the public interests. In such a case the sovereign ought clearly to refuse to allow a dissolution.'^b

Discretion
of the
Crown.

The sovereign has an undoubted constitutional right to withhold his consent to the application of a minister that he should dissolve parliament. But, on the other

^b Todd, *Parl. Govt.* v. 2, p. 408, new ed. p. 510.

hand, the Crown can only grant a dissolution upon the advice of a responsible minister.^(?) If the minister to whom a dissolution has been refused is not willing to accept the decision of the sovereign, it is his duty to resign. He must then be replaced by another minister, who is prepared to accept full responsibility for the act of the sovereign and for its consequences, in the judgment of parliament.^d

It is evident, therefore, that the sovereign—when in the exercise of this prerogative a dissolution is either granted or refused—must be sustained and justified by the agreement of a responsible minister. If this be constitutionally necessary as respects the sovereign, it is doubly so in the case of a governor. For the sovereign is not personally responsible to any earthly authority; but a governor is directly responsible to the Crown for every act of his administration.^e

Dissolution must be sustained by a minister.

Whenever the popular chamber refuses its confidence to ministers, the question whether, in doing so, it has correctly expressed the opinion of the country may properly be submitted to the test of a dissolution of parliament.^f Nevertheless, in the words of Charles James Fox, quoted by Sir Robert Peel in 1841, it is dangerous to admit of any other recognised organ of public opinion than the house of commons. So long as parliament may be reasonably presumed to represent the wishes of the people, it is not necessary to go beyond parliament to ascertain them. But, when this point is doubtful, the constitution permits of a dissolution for the purpose of solving the doubt.^g

It rests with the sovereign, however—or, in a colony,

^c E. A. Freeman, in *N. Am. Rev.* v. 129, p. 156.

^d Todd, *Parl. Govt.* v. 1, pp. 155, 209, new ed. p. 230, 314.

^e Governor Normanby, in *New*

Zealand Parl. Pap. 1877, A. 7, p. 3.

^f Todd, *Parl. Govt.* v. 2, p. 406, new ed. p. 506.

^g *Ib.* p. 407, new ed. p. 508.

Dissolu-
tion.

Prece-
dents.

with the representative of the sovereign—to determine the question whether, in a particular instance, a dissolution of parliament shall or shall not be allowed. An examination of the following precedents will enable us to arrive at certain additional principles, applicable to the exercise of this prerogative by a constitutional governor.^h

New
Brun-
swick
liquor
law.

We have already noted, in a former section, a remarkable case which occurred in New Brunswick in 1855, wherein the governor, being impressed with the conviction that certain legislation in a previous session, intended to enforce prohibition of the sale of liquor, had proved injurious to the country, and was altogether in advance of the public sentiment, suggested to his ministers the expediency of an immediate dissolution of parliament in order to elicit a decided expression of public opinion upon the question. Ministers demurred to this position, but the governor called upon them either to accept responsibility for the dissolution or to retire from office. They chose to resign; whereupon a new administration was formed, and the parliament dissolved. The result of the appeal to the country was to vindicate the wisdom of the governor's action; for the new parliament, in accordance with the opinion of the electorate, promptly repealed the objectionable legislation.ⁱ

Canadian
Brown-
Dorion
admini-
stration.

In the province of Canada, in 1858, upon the defeat of Mr. (afterwards Sir) John A. Macdonald's ministry by an adverse vote of the legislative assembly upon the question of the most suitable place for the future seat of government, the governor-general (Sir Edmund Head) commissioned Mr. George Brown, in conjunction with Mr. (afterwards Sir) A. A. Dorion, to form a new administration. The attempt proved unsuccessful, for reasons which will appear on the perusal of the following correspondence between Mr. Brown and the governor-general, which is taken from the newspapers of the period.^j

On Thursday the following note was received by Mr. Brown:—

‘Toronto: Thursday, July 29, 1858.

‘The members of the executive council have tendered their resignation to his excellency the governor-general, and they now retain their several offices only until their successors shall be appointed.

‘Under these circumstances his excellency feels it right to have

^h See *post*, p. 800.

ⁱ See *ante*, p. 660.

^j See also Mr. Mackenzie's *Life of Hon. G. Brown*, c. x.

recourse to you as the most prominent member of the opposition, and he hereby offers you a seat in the council as the leader of a new administration. In the event of your accepting this offer, his excellency requests you to signify such acceptance to him in writing, in order that he may be at once in a position to confer with you as one of his responsible advisers.

Brown-
Dorion
admini-
stration.

‘His excellency’s first object will be to consult you as to the names of your future colleagues, and as to the assignment of the offices about to be vacated to the men most capable of filling them.

(Signed)

‘EDMUND HEAD.

‘George Brown, Esq., M.P.P.’

Immediately on the receipt of this document Mr. Brown waited on the governor-general, and asked time to consult his friends.

On Friday morning Mr. Brown waited on the governor-general by appointment, and stated that he was engaged consulting his friends, but would next morning give his excellency a final answer.

On Saturday morning Mr. Brown waited on his excellency with the following acceptance of the trust proposed to him :—

‘Mr. Brown has the honour to inform his excellency the governor-general that he accepts the duty proposed to him in his excellency’s communication of 29th inst., and undertakes the formation of a new administration.

‘Church Street : July 31, 1858.’

On Sunday night, at ten o’clock, Mr. Brown was waited on by the governor-general’s secretary, and presented with the following memorandum :—

Governor
Head will
give no
pledge to
dissolve.

‘His excellency the governor-general forwards the enclosed memorandum to Mr. Brown to-night, because it may be convenient for him to have it in his hand in good time to-morrow morning.

‘The part which relates to a dissolution is in substance a repetition of what his excellency said yesterday at his interview with Mr. Brown.

‘The portion having reference to the prorogation or adjournment of parliament is important in determining the propriety of the course to be pursued.

‘His excellency therefore requests Mr. Brown to communicate the memorandum to his future colleagues, in order to avoid all misapprehension hereafter.

‘Government House, Toronto : August 1, 1858.’

Memorandum.

Brown-
Dorion
admini-
stration.

‘His excellency the governor-general wishes Mr. Brown to consider this memorandum, and to communicate it to the gentlemen whose names he proposes to submit to his excellency as members of the new government.

‘The governor-general gives *no pledge or promise, express or implied, with reference to dissolving parliament.* When advice is tendered to his excellency on this subject, he will make up his mind according to the circumstances then existing, and the reasons then laid before him.

‘The governor-general has no objection to prorogue the parliament without the members of the new administration taking their seats in the present session. But, if he does so, it ought, his excellency thinks, to be on an express understanding that parliament shall meet again as soon as possible, say in November or December. Until the new ministers meet parliament, his excellency has no assurance that they possess the confidence of the majority of the house.

‘The business transacted in the interval ought, in his opinion, to be confined to matters necessary for the ordinary administration of the government of the province.

‘If parliament is prorogued, his excellency would think it very desirable that the bill for the registration of voters, and that containing the prohibition of fraudulent assignments and gifts by traders, should be proceeded with and become law, subject, of course, to such modifications as the wisdom of either house may suggest. Besides this, any item of supply absolutely necessary should be provided for by a vote of credit, and the money for repairs of the canals, which cannot be postponed, should be voted.

‘His excellency can hardly prorogue until these necessary steps are taken. If parliament merely adjourns until after the re-election of the members of the government, the case is different, and the responsibility is on the house itself. A prorogation is the act of his excellency, and, in this particular case, such act would be performed without the advice of ministers who had already received the confidence of parliament. His excellency’s own opinion would be in favour of proroguing, if the conditions above specified can be fulfilled, and if Mr. Brown and his colleagues see no objection.

(Signed) ‘EDMUND HEAD.

‘Government House, Toronto : July 31, 1858.’

Early on Monday morning, Mr. Brown, on his own personal responsibility, and without consulting his proposed colleagues, sent the following note to the governor-general :—

‘Mr. Brown has the honour to acknowledge the receipt of his excellency the governor-general’s note of last night, with accompanying memorandum.

Brown-Dorion administration.

‘Before receiving his excellency’s note, Mr. Brown had successfully fulfilled the duty entrusted to him by the governor-general, and will be prepared, at the appointed hour this morning, to submit for his excellency’s approval the names of the gentlemen whom he proposes to be associated with himself in the new government.

‘Mr. Brown respectfully submits that, until they have assumed the functions of constitutional advisers of the Crown, he and his proposed colleagues will not be in a position to discuss the important measures and questions of public policy referred to in his excellency’s memorandum.

‘Church Street : August 2.’

On Monday morning, at half-past ten, Mr. Brown waited on his excellency, and submitted for his approval the names of the proposed government. At noon, on the same day, the members of the government took the oaths of office. On Monday night adverse votes were given against the administration in both houses. On Tuesday Mr. Brown waited on his excellency and informed him that the cabinet advised a prorogation of parliament, with a view to a dissolution. The governor-general requested the grounds of this advice to be put in writing. In compliance with his excellency’s request, the following memorandum was communicated to the governor-general :—

New ministry request a dissolution.

‘His excellency’s present advisers having accepted office on his excellency’s invitation, after the late administration had, by their resignation, admitted their inability successfully to conduct the affairs of the country in a parliament summoned under their own advice, and being unanimously of opinion that the constitutional recourse of an appeal to the people affords the best, if not the only solution of existing difficulties, respectfully advise his excellency to prorogue parliament immediately with a view to a dissolution.

‘When his excellency’s present advisers accepted office, they did not conceal from themselves the probability that they would be unable to carry on the government with the present house of assembly. That house, they believe, does not possess the confidence of the country ; and the public dissatisfaction has been greatly increased by the numerous and glaring acts of corruption and fraud by which many seats were obtained at the last general election, and for which acts the house, though earnestly petitioned so to do, has failed to afford a remedy.

Brown-
Dorion
admini-
stration.

‘For some years past, strong sectional feelings have arisen in the country, which, especially during the present session, have seriously impeded the carrying on of the administrative and legislative functions of the government. The late administration made no attempt to meet these difficulties or to suggest a remedy for them, and thereby the evil has been greatly aggravated. His excellency’s present advisers have entered the government with the fixed determination to propose constitutional measures for the establishment of that harmony between Upper and Lower Canada which is essential to the prosperity of the province. They respectfully submit that they have a right to claim all the support which his excellency can constitutionally extend to them in the prosecution of this all-important object.

‘The unprecedented and unparliamentary course pursued by the house of assembly, which immediately after having, by their vote, compelled the late ministry to retire, proceeded to pass a vote of want of confidence in the present administration, without notice, within a few hours of their appointment, in their absence from the house, and before their policy had been announced, affords the most convincing proof that the affairs of the country cannot be efficiently conducted under the control of the house as now constituted.’

At two o’clock this day, the following memorandum was received from the governor-general :—

Governor
Head’s
reasons
for
refusing.

‘His excellency the governor-general has received the advice of the executive council to the effect that a dissolution of parliament should take place.

‘His excellency is no doubt bound to deal fairly with all political parties ; but he has also a duty to perform to the Queen and the people of Canada paramount to that which he owes to any one party, or to all parties whatsoever.

‘The question for his excellency to decide is not “What is advantageous or fair for a particular party ?” but what upon the whole is the most advantageous and fair for the people of the province.

‘The resignation of the late government was tendered in consequence of a vote of the house, which did not assert directly any want of confidence in them.

‘The vote of Monday night was a direct vote of want of confidence on the part of both houses. It was carried in the assembly by a majority of forty in a house of a hundred and two, out of one hundred and thirty members, consequently by a majority of the whole house, even if every seat had been full at the time of the vote.

'In addition to this, a similar vote was carried in the upper house by sixteen against eight, and an address founded on the same was adopted.

Brown-
Dorion
admini-
stration.

'It is clear that under such circumstances a dissolution, to be of any avail, must be immediate. His excellency the governor-general cannot do any act other than that of dissolving parliament by the advice of a ministry who possess the confidence of neither branch of the legislature.

'Is it then the duty of his excellency to dissolve parliament ?

'It is not the duty of the governor-general to decide whether the action of the two houses on Monday night was or was not in accordance with the usual courtesy of parliament towards an incoming administration. The two houses are the judges of the propriety of their own proceedings. His excellency has to do with the conclusions at which they arrive, provided only that the forms observed are such as to give legal and constitutional force to their votes.

'There are many points which require careful consideration with reference to a dissolution at the present time. Amongst these are the following :—

'I. It has been alleged that the present house may be assumed not to represent the people ; if such were the case, there was no sufficient reason why, on being in a minority in that house, the late government should have given place to the present. His excellency cannot constitutionally adopt this view.

'II. An election took place only last winter. This fact is not conclusive against a second election now, but the cost and inconvenience of such a proceeding are so great that they ought not to be incurred a second time without very strong grounds.

'III. The business before parliament is not yet finished. It is perhaps true that very little which is absolutely essential for the country remains to be done. A portion, however, of the estimates and two bills, at least, of great importance are still before the legislative assembly, irrespective of the private business.

'In addition to this, the resolutions respecting the Hudson's Bay Territory have not been considered, and no answer on that subject can be given to the British government.

'IV. The time of year and the state of affairs would make a general election at this moment peculiarly inconvenient and burthensome, inasmuch as the harvest is now going on in a large portion of the country, and the pressure of the late money crisis has not passed away.

'V. The following considerations are strongly pressed by his excellency's present advisers as reasons why he should authorise

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Dorion
admini-
stration.

an appeal to the people, and thereby retain their services in the Council :—

‘ 1. The corruption and bribery alleged to have been practised at the last election, and the taint which on that account is said to attach to the present legislative assembly.

‘ 2. The existence of a bitter sectional feeling between Upper and Lower Canada, and the ultimate danger to the union, as at present constituted, which is likely to arise from such feeling.

‘ If the first of these points be assumed as true, it must be asked what assurance can his excellency have that a new election, under precisely the same laws, held within six or eight months of the last, will differ in its character from that which then took place ?

‘ If the facts are as they are stated to be, they might be urged as a reason why a general election should be avoided as long as possible ; at any rate, until the laws are made more stringent, and the precautions against such evils shall have been increased by the wisdom of parliament. Until this is done the speedy recurrence of the opportunity of practising such abuses would be likely to aggravate their character and confirm the habit of resorting to them.

‘ The second consideration, as to the feeling between Upper and Lower Canada, and the ultimate danger of such feelings to the union, is one of a very grave kind. It would furnish to his excellency the strongest possible motive for a dissolution of parliament, and for the retention of the present government at all hazards, if two points were only conclusively established ; that is to say, if it could be shown that the measures likely to be adopted by Mr. Brown and his colleagues were a specific, and the only specific, for these evils, and that the members of the present council were the only men in the country likely to calm the passions and allay the jealousies so unhappily existing. It may be that both these propositions are true, but, unless they are established to his excellency’s complete satisfaction, the mere existence of the mischief is not in itself decisive as to the propriety of resorting to a general election at the present moment. The certainty, or, at any rate, the great probability, of the cure by the course proposed, and by that alone, would require to be also proved. Without this, a great present evil would be voluntarily incurred for the chance of a remote good.

‘ VI. It would seem to be the duty of his excellency to exhaust every possible alternative before subjecting the province for the second time in the same year to the cost, the inconvenience, and the demoralisation of such a proceeding.

‘ The governor-general is by no means satisfied that every alter-

native has been thus exhausted, or that it would be impossible for him to secure a ministry who would close the business of this session, and carry on the administration of the government during the recess with the confidence of a majority of the legislative assembly.

Brown-Dorion
admini-
stration.

‘After full and mature deliberation on the arguments submitted to him by word of mouth, and in writing, and with every respect for the opinion of the council, his excellency declines to dissolve parliament at the present time.

(Signed) ‘EDMUND HEAD.

‘Government House, Toronto, C. W. : August 4, 1858.’^k

Immediately on the receipt of this document, Mr. Brown proceeded to the government house and placed in the hands of his excellency the resignations of himself and colleagues.

New
ministry
resign.

‘Mr. Brown has the honour to inform his excellency the governor-general that, in consequence of his excellency’s memorandum of this afternoon, declining the advice of the council to prorogue parliament with a view to a dissolution, he has now on behalf of himself and colleagues to tender their resignations.

‘Executive Council Chamber, Toronto : August 4, 1858.’

The previous administration was accordingly recalled. In order to avoid the necessity for their formal re-election—when in fact they plausibly assumed that they had been actually reinstated in office owing to the failure of negotiations with their political opponents—the new ministers availed themselves of certain statutory provisions, by which they were enabled to resume their places without vacating their seats.^l The nominal premier was changed, and certain minor alterations in the *personnel* of the administration took place ; but substantially it was a return to power of the Macdonald ministry, and they succeeded in maintaining the policy in regard to the seat of government which had led to their temporary loss of office. Attempts were made to question their proceedings in resuming their places without going for re-election ; but ministers were sustained, not only by the legislative assembly, but also by judgments upon the case in the courts of law.^m

Previous
ministry
rein-
stated.

In 1860 the lieutenant-governor of Nova Scotia (Lord Mulgrave) was placed in a position somewhat resembling that of Sir Edmund Head in the preceding case. After a dissolution of parliament in

^k Leg. Coun. Jour. 1858, p. 440. 973-976, 1001 ; U. C. Q. B. Rep. v.

^l 20 Vic. c. 22, s. 7 ; now Con. 17, p. 310 ; U. C. C. P. Rep. v. 8, p. Stat. Can. 1886, v. 1, p. 181, s. 3. 479.

^m Leg. Assem. Jour. 1858, pp.

Governor
Mulgrave,
in Nova
Scotia,
refuses a
dissol-
ution.

the previous year, his ministers, who had heretofore a good working majority, found themselves considerably weakened, the opposition being almost able to turn the scale against them. Ministers declared, however, that several of their opponents were disqualified, and that their seats should be vacated. They endeavoured to persuade the house to unseat these gentlemen without a resort to the legal method of trying controverted elections. But the attempt was unsuccessful. Instead, the house resolved that they had no confidence in the administration.

Whereupon ministers strongly urged upon the governor the necessity for another dissolution of parliament, not only on their own behalf, but also on public grounds. His excellency carefully reviewed their arguments, dissented from their conclusions, and declined to accede to their request. He promised that, whenever he should be of opinion 'that a constitutional necessity for a dissolution exists,' he would not hesitate to appeal to the country; but he added, 'so long as I remain her Majesty's representative in Nova Scotia, I shall claim to be the judge of when that time has arrived.' As it was, he deemed it to be neither expedient nor for the public convenience that a dissolution should take place so soon after a general election. Accordingly the ministry resigned.

Ministry
resign.

In defending his conduct upon this occasion to the secretary of state for the colonies, the governor said:—'I quite admit that when a council is backed by a majority of the house, a governor is bound in ordinary cases to follow their advice, and that it is chiefly by his influence and persuasion that he must endeavour to direct their conduct, but Mr. Johnston (the premier) would place a governor in the same position as the Queen, and the council in the position of the cabinet at home, forgetting entirely that the governor is himself responsible to the home government, and that it is no excuse for him to say, in answer to any charge against his administration of affairs, "I did so by the advice of my council."' Ministers having advised a dissolution after a vote of want of confidence had passed, 'their advice had ceased to carry that weight which under other circumstances would attach to it;' and, 'in the event of the people deciding against them,' the governor would 'have been left to answer for having refused to acknowledge the vote of the majority in a house which had only just been elected by the people, an act which I consider would have been most unconstitutional.'

New
ministry
appointed.

In charging the leader of the opposition with the task of forming a new ministry, the governor required of him a written pledge that he would facilitate a legal inquiry into the right to the contested seats, and that parliament should not be prorogued until that question was decided. This pledge was given, and faithfully kept.

The result of the inquiry into the legality of disputed elections proved somewhat surprising. The alleged disqualification, which had been so vehemently asserted by the ex-ministers, was not substantiated; and the members declared by their opponents to be disqualified were pronounced by the proper tribunal to have been duly elected. Nevertheless, the ex-ministers persevered in attempts to obtain a dissolution of parliament; but the governor would not yield. The house sustained the new ministry on a test vote by a majority of four. And the colonial secretary, upon receiving the report of the governor's proceedings, expressed entire approval of his excellency's conduct.ⁿ

In 1871, the governor of South Australia (Sir James Fergusson) agreed to allow a dissolution to his ministers, after their defeat on November 16, on a vote of want of confidence, which was carried against them in the assembly by the casting vote of the speaker. Whereupon both houses of parliament passed addresses, praying the governor to dismiss his ministers at once, and not to grant them a dissolution. In reply to these addresses, the governor informed the legislative council that he regretted his inability to comply with their request; and he informed the assembly that, under the existing circumstances, he did not feel justified in refusing to his advisers the appeal which they desired to make to the constituencies from the vote of the house. On the same day the governor proceeded to prorogue parliament, with a view to its immediate dissolution.^o

Governor Fergusson of South Australia, grants a dissolution, under parliamentary protest.

In May, 1872, the legislative assembly of Victoria having agreed to a vote expressing a want of confidence in the administration of Mr. (afterwards Sir) C. Gavan Duffy, the cabinet presented to the governor (Lord Canterbury) a minute expressing their conviction that they were bound to give effect to this vote either by an immediate resignation of office or by recommending a speedy dissolution of parliament.

Governor Canterbury, of Victoria, refuses a dissolution.

They believed that a dissolution of parliament, as an alternative to resignation of office, was justifiable under any one of the following circumstances:—

‘1. When a vote of “no confidence” is carried against a government which has not already appealed to the country.

‘2. When there are reasonable grounds to believe that an adverse vote against the government does not represent the opinions and wishes of the country, and would be reversed by a new parliament.

ⁿ Nova Scotia Assem. Jour. 1860, App. pp. 11-46; *ib.* 1861, App. No. 2.

^o S. Australia Leg. Coun. Jour. 1871, p. 65; Assem. Jour. 1871, pp. 235, 237.

Dissolu-
tion
refused in
Victoria.

'3. When the existing parliament was elected under the auspices of the opponents of the government.

'4. When the majority against a government is so small as to make it improbable that a strong government can be formed from the opposition.'

All these conditions they believed to be united in their own case. The present ministry was appointed a year ago, after a general election; and the constituencies had had no opportunity of pronouncing upon their public policy.

This memorandum, otherwise very able, contained one grave error. It alleged that 'in England it may be said to have become a maxim of constitutional law that the alternative of resignation or dissolution is left absolutely to the discretion and responsibility of ministers.' And it inferred, from this erroneous assumption, that a similar rule should be recognised, equally without qualification, as applicable to the colonies.^p

In reply, the governor pointed out that, inasmuch as of late years it had not been customary for the sovereign to refuse a dissolution asked for by her ministers, as an alternative to a resignation of office—a circumstance from which, however, a very questionable inference was drawn in respect to the constitutional law of the mother country—it was not therefore to be assumed that a governor had no discretion in such matters. Colonial governors, though not constitutionally responsible to colonial legislatures, are personally responsible to the Crown. This responsibility involves practically, though indirectly, serious local responsibilities—especially in regard to dissolutions—of which no governor can divest himself.

Adverting to the 'four conditions' above specified—in any one of which, Mr. Duffy believed, recourse might properly be had to a dissolution—the governor declined to admit that any or all of these considerations 'would, under all conceivable circumstances, and without any reference whatever to any other fact or facts, however important, justify a dissolution.'

Admitting the propriety of the recommendation to dissolve as coming from his advisers, the governor himself, in the exercise of his constitutional discretion, thought it premature at the time to act upon that advice.

The vote of censure which had led to the present crisis was principally directed against acts of administration and not of legislation. The governor was not satisfied that the majority in the

^p Com. Pap. 1873, v. 50, p. 315. See also Victoria Assem. Votes and Proc. 1872, No. 45.

assembly would not have approved of the proposed legislative measures of ministers. If not, with parties so evenly balanced in the assembly, a new administration might probably be formed which would obtain sufficient support from the existing chamber to enable them to carry on the public business.

Dissolu-
tion
refused in
Victoria.

The adoption of a non-confidence vote by the assembly had undoubtedly rendered it impossible for the present ministry to remain in office unless the assembly should be dissolved, but the governor deemed it to be his duty, under existing circumstances, to put himself into communication with the party by which this vote had been carried, and endeavour to form a ministry without being obliged to resort to that which he considered would be essentially, if not exclusively, a penal dissolution.

Whereupon the Duffy administration resigned. They did not feel warranted in debating any of the grounds upon which his excellency had arrived at his decision, but protested against being understood as implying their acquiescence in those reasons.

The governor then sent for Mr. Francis, who succeeded in forming a new administration to which the confidence of parliament was given, without the necessity for having recourse to a dissolution.^a

In reviewing this difficult case, it is evident, in the first place, that Lord Canterbury was right when he vindicated for himself a 'constitutional discretion' to decide as to the expediency or otherwise, upon grounds of public policy, whether or not to grant an appeal to the country to this defeated administration.

Reasons
for
approving
of Lord
Canter-
bury's
decision.

No doubt the governor's refusal of this appeal was a great hardship to the Duffy ministry, for they had good reason to anticipate a favourable response had they been allowed a dissolution.

It has been often urged that a ministry is entitled to claim from the Crown the dissolution of a parliament which had been elected under the auspices of their political opponents, and that this claim may be preferred whenever the popular branch thinks fit to withhold its confidence from an administration. But neither constitutional usage nor a just appreciation of the

^a Victoria Assem. Votes and Proc. 1872, No. 45. And see Victoria Year Book, p. 1.

Dissolu-
tion
refused in
Victoria.

monarchical office will warrant any such limitation of the discretion of the Crown in the exercise of this prerogative. For it is not a legitimate use of the prerogative of dissolution to resort to it when there is no important political question upon which contending parties are directly at issue, and merely in order to maintain in power the particular ministers who are in office at the time.^r

It has been alleged that eminent constitutional authorities in England expressed their opinion that Lord Canterbury acted on this occasion too arbitrarily in refusing to grant a dissolution to the Duffy administration.^s But, on the other hand, it would appear that the governor's decision was justified by the result, inasmuch as the ministry which succeeded to office had no difficulty in securing the confidence of the existing assembly. And upon the retirement of Lord Canterbury from the government of Victoria in the following year, when his term of service expired, he received cordial addresses of respect and consideration for his public conduct from both houses of the colonial parliament.

New
Zealand
ministry
ask for a
dissolu-
tion.

In New Zealand, on October 5, 1872, the Stafford administration was defeated in the house of representatives, upon a motion by Mr. (now Sir) Julius Vogel of want of confidence, which was passed by a majority of two. This ministry had been in existence but four weeks, their predecessors having resigned upon a similar defeat by an adverse majority of three. These facts seemed to show 'that no party in the present house was strong enough to command a reliable working majority.'

Mr. Stafford accordingly advised the governor (Sir George Bowen) to grant a dissolution of parliament, the existing house having been elected during the time of the preceding administration, which at first had a large majority, but which had gradually dwindled away. From the best information at his command, Mr. Stafford was satisfied that the result of a dissolution would be the return of a decisive majority in favour of his policy.

^r See Todd, *Parl. Govt.* v. 2, p. 406, new ed. p. 507.

^s Private letter from Victoria.

Before replying to this request, the governor inquired whether the existing parliament would be ready to grant the necessary supplies to carry on the public service until a new parliament could be convened. Mr. Stafford answered that he had no doubt that, in accordance with constitutional usage, the requisite supplies for the public service, limited to the shortest period which would enable a new parliament to meet, would be voted.

On October 7, Governor Bowen made known his decision. After carefully reviewing the case in all its bearings, he said he was unable to acquiesce in an immediate dissolution. He believed frequent dissolutions to be objectionable on principle. 'They have an obvious tendency to cause members to be regarded as mere delegates of the constituencies and not as representatives of the country at large.' The existing parliament, elected for five years, is barely eighteen months old. No measure of urgent importance on which public opinion is divided is before the country. The governor was not, therefore, satisfied that a dissolution would materially alter the present evenly balanced state of parties. He would prefer to try and form a new ministry on a wider basis, which might be strong enough to carry on the government without delay or interruption.

Governor
Bowen
refuses
dissolu-
tion.

Accordingly, the Stafford administration resigned office, and on October 11, the Waterhouse ministry was appointed. This cabinet at once commanded a strong working majority in the legislature, a circumstance which, coupled with other subsequent events, proved unmistakably that the general sentiment of parliament and of the country was in favour of the course pursued by Governor Bowen on this occasion.*

New
ministry.

Two months afterwards, however, the premier (Mr. Waterhouse) unexpectedly brought about another ministerial crisis by placing his resignation in the governor's hands. There had been no difference whatever between ministers and the governor, nor any serious dissensions in the cabinet. But Mr. Waterhouse was dissatisfied with the relations between himself and Mr. Vogel, a brother minister, whose influence in the cabinet was seemingly predominant. He therefore determined to retire. The governor begged him to reconsider his resolve, in view especially of the fact that the resignation of the prime minister must, by constitutional usage, dissolve the ministry, and this too at a very inconvenient period. But, as Mr. Waterhouse adhered to his determination, the governor requested Mr. Fox to assume the premiership and reconstruct the

* N. Zealand H. of Rep. Jour. And see Rusden, Hist. N. Zealand, 1872, App. A, No. 10; Leg. Coun. v. 3, p. 38. Jour. 1873, App. No. 4, p. 5, 19.

Five
ministries
in seven
months.

ministry. Mr. Fox undertook this duty, but in a month afterwards he also resigned. Mr. Vogel was then appointed premier, making five successive administrations in seven months! The secretary of state for the colonies was duly notified of these transactions, but he contented himself with acknowledging the receipt of the despatches communicating the information.^u

Sir G.
Grey asks
for a dis-
solution,

In the same colony, in November, 1877, the premier, Sir George Grey, requested the governor, the Marquis of Normanby, to dissolve the house of representatives, on account of the evenly balanced state of parties therein. The Grey administration had taken office on October 13 previous, on the defeat of their predecessors upon a vote of want of confidence. On October 24, before the new ministers had announced their intended policy, a vote of want of confidence was submitted against them. This was negatived, on November 6, by the casting vote of the speaker. Shortly after, a similar motion was proposed, during the debate upon which ministers asked for a dissolution of parliament.

which
Governor
Normanby
declines.

They based their claim to a dissolution upon the fact that at the last general election the ex-ministry were in power, and upon their conviction that the new elections would give them a large majority of supporters.

In reply, the governor expressed his opinion that a dissolution was, at present, undesirable; principally because (1) he believed that the existing difficulties might be disposed of without recourse to such an act; (2) because the parliament was now only in its second session, and legislation was contemplated upon the question of representation, which would probably necessitate a dissolution; (3) because no great question was at issue upon which to appeal to the constituencies; (4) because he had no assurance that a dissolution would produce a working majority in favour of ministers; and (5) because no supply had yet been granted; and unless the house should first vote supplies, for at least three months, the governor could not undertake to consider the question of a dissolution.

Furthermore, it did not appear that from the outset this administration had been able to command a majority of the house. The speaker's vote, which alone had saved them from defeat, is, according to parliamentary usage, always given with a view not to preclude the house from reconsidering a question so decided upon. A speaker's casting vote, given to negative a vote of want of confidence, 'can hardly be taken as an expression of confidence on the part of the house.'^v

^u Rusden, *Hist. N. Zealand*, *Zealand Statistics*, 1876, pp. 6, 7. v. 3, p. 48; *N. Zealand Parl. Pap.* 1873, A 1, a. pp. 7-20; N.

^v See *ante*, p. 714 n.

Sir George Grey's answer to the governor's memorandum was, for the most part, a vindication of his right to a dissolution, whether or not supply should be previously granted, as to which, he believed, 'the governor had nothing to do, because the decision ought to rest with the ministers, the parliament, and the people.'

In a subsequent memorandum, ministers strongly urged the necessity, on financial grounds, for a speedy dissolution. They denied the right of the governor to base his exercise of the power to dissolve parliament upon the prerogative of the Crown. They contended that it was a power derived from the constitution act, and was, therefore, 'one of those questions on which, according to constitutional law, the governor should act on the advice of his ministers.' They, therefore, reasserted their right to a dissolution, 'unfettered by any condition of supplies being granted ;' and declined to enter into any compromise in the matter.

The governor, in his reply, pointed out that, under the constitution act, his right, at his own discretion, to prorogue or dissolve the assembly was clear ; and that, by the royal instructions, his authority to exercise that right, notwithstanding the opposition of his ministers, was established. Accordingly, he 'could not admit that ministers have an unqualified right to a dissolution when the governor may consider it undesirable or unnecessary.'

Ministers still endeavoured to controvert the governor's arguments ; but he refused to discuss with them his constitutional position, responsibilities, or duties ; though he admitted their undoubted right to appeal to her Majesty, through the secretary of state, in respect to his conduct, whenever he might deem it his duty to decline to comply with their advice. Should such a complaint be preferred, the governor would forward it to the secretary of state with such explanations as might be required.

Reiterated attempts were made by the ministry to induce the governor to give way and grant them a dissolution of parliament, in conformity with the rights which they contended appertained to the Queen's ministers in England. But his excellency adhered to his resolve, not under present circumstances to yield to their request, until at any rate all other expedients had failed to beget a good understanding between ministers and the house. He did not think it expedient to impose an unconstitutional pressure on parliament by promising a dissolution at some future period, when it might suit ministers to go to the country ; nor did he see any immediate need for such an act. He would not deny that ministers in a colony have equal rights with ministers in England, in matters that do not affect Imperial interests ; but he did not believe that, in similar circumstances, a minister in England would ask for a dissolution 'when

Sir G. Grey denies governor's right to refuse dissolution.

The governor is firm.

there was no great political question directly at issue between the contending parties, and simply in order to maintain in power' an existing administration.

The upshot of the matter was that parliament was prorogued, without reference to any contemplated dissolution, the usual supplies, meanwhile, having been voted for the service of the current year.^w

Governor declines a second request to dissolve.

A month after the prorogation Sir George Grey renewed his application to the governor for a dissolution of parliament. But at this time Lord Normanby was of opinion that there was a fair prospect of the ministry being able to secure, in the next session, the support of the popular chamber. And as there was no definite question at issue upon which an appeal to the country could be made, the governor again declined to accede to this request. Upon which Sir George Grey repeated his assertion that the governor was not warranted in exercising any discretion in the matter, and claimed that he ought to grant a dissolution whenever a ministry thought fit to demand it.

Secretary of state sustains the governor.

Whereupon his excellency submitted the entire correspondence on this question to the secretary of state for the colonies. Sir M. Hicks-Beach, in a despatch dated February 15, 1878, expressed his dissent from Sir George Grey's opinion, in respect to the powers of the governor, as being an undue limitation of the prerogative of the Crown. He said that 'the responsibility, which is a grave one, of deciding whether, in any particular case, it is right and expedient, having regard to the claims of the respective parties in parliament, and to the general interests of the colony, that a dissolution should be granted, must, under the constitution, rest with the governor. In discharging this responsibility, he will, of course, pay the greatest attention to any representations that may be made to him by those who, at the time, are his constitutional advisers; but, if he should feel himself bound to take the responsibility of not following his ministers' recommendation, there can, I apprehend, be no doubt that both law and practice empower him to do so.'^x

Defeat of Grey ministry.

The Grey administration continued in office for about two years. But, on July 29, 1879, they were defeated by a majority of fourteen, in the house of representatives, upon an amendment to the address in answer to the speech from the throne, at the opening of the session. This amendment expressed a want of confidence in the ministry.

^w N. Zealand Parl. Pap. 1877, N. Zealand Gaz. 1878, pp. 911-914.

^x *ib.* 1878, A. 1, p. 3.

^z *ib.* 1878, App. A. 2, p. 14;

Sir George Grey then applied to the governor (Sir Hercules Robinson) to grant him a dissolution of parliament. His excellency responded to the request in the following memorandum, which was laid on the table of the house by the premier :^y—

‘I have carefully considered the position in which ministers are placed by the defeat which they have just sustained, in the house of representatives, upon a no-confidence motion ; and I am clearly of opinion that they have a fair constitutional claim to a dissolution.

Governor Robinson permits an appeal to the people, conditionally.

‘No doubt a general election at the present moment would be inconvenient, having regard to the condition of public business (the prevailing financial depression) and the circumstances of the colony generally—especially the native difficulties upon the west coast. But I presume that ministers have carefully considered the consequences of such a step, before tendering to me advice to dissolve ; and I am, therefore, prepared to adopt their recommendation—leaving with them the entire responsibility of such a proceeding.

‘At the same time, I think it right to stipulate that the well-recognised constitutional principles which govern cases like the present shall be strictly adhered to. Ministers have lost the confidence of the representatives of the people, and are about to appeal from them to the country. A majority of the house of representatives has declared that ministers have so neglected and mismanaged the administrative business of the country that they no longer possess the confidence of parliament. It is indispensable in such circumstances, if ministers do not at once resign, that parliament shall be dissolved with the least possible delay ; and that, meanwhile, no measure shall be proposed that may not be imperatively required, nor any contested motion whatever brought forward. It is necessary also, and in accordance with established constitutional precedent, that the new parliament shall be called together at the earliest moment at which the writs are returnable.^z

‘If ministers accept a dissolution upon this understanding, I beg that, in any explanation which the premier may think proper to

^y N. Zealand Parl. Pap. 1879, A. 1.

^z In an electoral act passed in New South Wales in 1880 (44 Vic. No. 13, secs. 15 and 16), it is provided that writs for general elections shall always be made returnable within thirty-five days after their issue, and that the day to be fixed

for the meeting of parliament shall be within seven days after the return day of the writs. In Victoria writs are returnable within forty days, in Tasmania within fifty days, in New Zealand within forty days ; but no date fixed for meeting of parliament.

Grey
ministry.

make to parliament, the answer which I have given to his tendered advice may be stated in my own words.

‘HERCULES ROBINSON.

‘July 30, 1879.’

By a ‘contested motion,’ the governor subsequently explained to Sir George Grey that he did not mean a bill of supply or a loan bill. Ministers thereupon entered into communication with the opposition, for the purpose of arriving at a good understanding in respect to the measures which should be allowed to proceed without objection, as being of imperative importance, and not involving any disputed principle.^a On August 11 parliament was prorogued by commission, and the dissolution ensued shortly afterwards.

Both
houses ask
for an
imme-
diate
meeting
of new
parlia-
ment.

Meanwhile, however, a curious, if not an unprecedented, circumstance occurred. The majority in both branches of the legislature were not disposed to accept the assurances of the premier that a new parliament should be convened at the earliest possible moment. They, therefore, passed formal resolutions and addresses to the governor on the subject, requesting his excellency to take such steps as might afford an adequate security that the meeting of the new parliament should not be delayed any longer than might be indispensably necessary. Whereupon, the following correspondence took place between the governor and the premier, which, by desire of the governor, was presented to both houses of the general assembly :^b—

‘*Memorandum for the Premier.*

‘The governor has received, from the speaker of the legislative council and from the speaker of the house of representatives, addresses which have been adopted by each house of the legislature, in effect urging the governor to insist upon the faithful fulfilment of the stipulation which he attached to the promise of a dissolution ; namely, that the new parliament shall be called together at the earliest moment at which the writs can be made returnable.

‘In view of these circumstances, and of the fact that ministers have been condemned in both houses of parliament—having regard also to the critical state of native affairs—the governor considers that it is his bounden duty to take every possible precaution that he shall be in a position to recur to the advice of a new parliament at the earliest date allowed by law.

‘The governor desires, therefore, to inform the premier that, before proroguing parliament with a view to dissolution, he must receive from the premier a written assurance, which shall appear to

^a N. Zealand Parl. Deb. v. 31, p. 327.

^b N. Zealand Parl. Pap. 1879, A. 2.

the governor satisfactory, as to the date on which the premier will advise the issue of the new writs, and the date upon which he will advise that they be made returnable. Grey ministry.

‘HERCULES ROBINSON.

‘August 7, 1879.’

‘Memorandum for his Excellency.

‘Sir George Grey presents his respectful compliments to Sir Hercules Robinson. Minis-
terial
pledge
thereon.

‘In obedience to the terms of the directions contained in the governor’s memorandum of the 7th inst., Sir George Grey gives a written assurance that he will advise that the writs summoning the new parliament shall be issued within two days after the dissolution, and that they shall be made returnable within thirty days after their issue ; and Sir George Grey trusts that this assurance will be satisfactory to the governor.

‘G. GREY.

‘Wellington : August 8, 1879.’

‘Memorandum for the Premier.

‘The governor thanks the premier for his memorandum of this date, and in reply has much pleasure in informing him that the assurance which it contains is quite satisfactory.

‘If the premier sees no objection, the governor would be glad if he would communicate to the legislative council and to the house of representatives the governor’s memorandum of yesterday, with the subsequent memoranda on the subject, as showing to both houses the action taken by the governor upon their addresses.

‘HERCULES ROBINSON.

‘August 8, 1879.’

The elections virtually turned on the question whether Sir G. Grey should continue to rule the colony. They resulted unfavourably to his administration, so that, on the assembling of the new parliament, on September 24, a vote of want of confidence was proposed, which, after a protracted debate, was carried against ministers, but only by a majority of two. On October 3 the ministry resigned. Mr. John Hall was then entrusted by the governor with the formation of a new administration—a task which he successfully accomplished. Sir George Grey accepted his defeat, and declared his intention of not again being a candidate for office.^c Grey
ministry
defeated.

New
ministry
formed.

^c N. Zealand House Jour. 1880, App. A. 1, p. 35. The Colonies newspaper, Nov. 29, 1879.

Hall
ministry.

Mr. Hall announced the intended policy of his ministry in the house of representatives on October 14. But the new administration were met by vehement opposition in that chamber before they had time to prove their fitness for office. A vote of want of confidence was proposed against them at the outset. They succeeded, however, in winning over certain of their opponents; this motion was withdrawn, and the new ministry proceeded successfully with public business.^d

Sir G.
Grey tries
to keep
new
premier
out of the
house.

Sir George Grey, however, undertook to assail the new premier upon extraordinary grounds, and in a very unprecedented and discreditable manner.

It appears that Mr. Hall was a member of the legislative council, but, previously to the general election, he determined to resign his seat therein, with a view to election to the house of representatives, and for the purpose of leading his party in that house. He accordingly applied to the governor for permission to relinquish his seat as a life-member in the council, which had been repeatedly done before under similar circumstances. Sir G. Grey (then in office as premier) endeavoured to thwart Mr. Hall in this project, and declined to consent to the formal acts necessary to complete the transaction.

The governor remonstrated with the premier for such ungenerous conduct. He pointed out that it was a perfectly justifiable as well as a not unusual proceeding, and declined 'to lend himself to any device for placing one of the premier's political opponents under a disability not imposed by law,' declaring that he would not be 'a party to such an unprecedented and strained exercise of a mere formal act of prerogative for party purposes.' Sir G. Grey, however, persisted in his opposition, and warned Sir Hercules Robinson that 'every act of the governor must be done under advice and ministerial responsibility.' The governor replied that this doctrine was undoubtedly correct, but that a governor 'could always reject ministerial advice if he were prepared to face the constitutional consequences; and that, in this case, if such advice were tendered, he should unquestionably refuse it, which would leave the premier with the constitutional alternative of resignation or acquiescence in the refusal.' The premier then took his departure, saying he should consult his colleagues. The result was that the necessary papers to complete Mr. Hall's resignation were quietly sent to the governor for his signature.

But is
frustrated
by the
governor.

Afterwards, in debate in the house of representatives, Sir George

^d The Colonies newspaper, Dec. 6 and 27, 1879; N. Zealand Parl. Deb. v. 32, p. 579.

Grey, without permission of the governor, disclosed these particulars, disavowed any responsibility for the transaction by which Mr. Hall was enabled to vacate his seat in one house so as to become a candidate for the other, and threw upon the governor the *onus* and responsibility of it.

Sir G. Grey declines responsibility.

This placed the governor in a dilemma. He was anxious not to obtrude his name and authority before either house of parliament in an irregular way ; and yet he could not allow such unwarrantable conduct on the part of Sir George Grey to pass without notice or explanation. His excellency therefore put in writing the history of this occurrence, and gave the memorandum to Mr. Hall to make what use of it he pleased. Mr. Hall read this paper to the house on October 21, but not as an official communication. It plainly showed that, while Sir G. Grey had publicly stated that he had opposed the act in question, but that the governor had insisted upon it, and therefore it had been done by him, 'without advice,' that this statement was, in fact, 'only half the truth.' Sir G. Grey's subsequent conduct, in causing the papers necessary to perfect Mr. Hall's resignation to be forwarded to the governor 'without any adverse advice,' was tantamount to his formal acquiescence in the act, and rendered himself, as premier and not the governor, solely responsible for the same to the house of representatives.^e It need not be said that this is sound doctrine, for no ministry can relieve themselves from the responsibility of having advised an act done by the Crown during their continuance in office.^f

The Hall administration continued in office until April, 1882, when it retired under the following circumstances. In the session of 1881, ministers being strong in the confidence of parliament, obtained a grant of supply, not merely to the close of the financial year (on March 31), which extended to a considerable time after the natural end of the existing parliament, but for two months later.

^e N. Zealand Parl. Deb. v. 32, pp. 283-289, 387, 397. See also N. Zealand Parl. Pap. 1879, Sess. II. No. H., 26, for a correspondence between Sir G. Grey and Governor Normanby, shortly before his excellency left the colony, wherein the governor complains of personal discourtesy towards himself on the part of the premier, and that important information on public affairs had been 'purposely withheld from him.' Again, on July 24, 1880, Governor Robinson was obliged to send a memorandum to his minis-

ters to deny an allegation made by Sir G. Grey in his place in the house of representatives in debate on the Maori prisoners bill, wherein Sir G. Grey (then leading the opposition) had misapprehended certain facts, to the detriment of the governor. The premier communicated this information to the house, and the governor transmitted the particulars to the secretary of state for the colonies. N. Zealand House Jour. 1881, App. A. 1, p. 8.

^f See *ante*, pp. 19, 50, 128.

Hall
ministry
resign.

The session closed on September 24. On November 8 the premier advised an immediate dissolution with an expressed intention of not holding another session for six months. The governor, Sir A. H. Gordon, consented to this proposal with some hesitation. The elections resulted in the return of an unusual number of 'independent' members, and the avowed supporters of ministers had not 'an absolute majority.' This induced the governor to believe that an early session of the new parliament should take place. Ministers did not concur in this opinion; and although six leading members of the house memorialised the governor to convene parliament before the expiry of the financial year, it was not summoned to meet until May 18. Meanwhile the premier was obliged to resign on account of ill-health. His colleagues likewise retired. But Mr. Hall advised the governor to authorise Mr. Whitaker (the attorney-general) to form a new ministry. At first the governor declined, and sent for the leader of the opposition, Sir George Grey, to consult him on the emergency. Sir George was not confident of his own success if he were charged with the formation of a ministry. The governor then summoned Mr. Whitaker, who succeeded in re-constructing the former ministry under himself as premier. The new administration found no difficulty in securing the confidence of parliament.⁸

Tasmania
ministry
ask for a
dissol-
ution.

In Tasmania in May, 1877, the Fysh ministry having been defeated in the house of assembly on a vote of want of confidence, the premier requested the governor to grant them a dissolution, inasmuch as they had lately acceded to office upon the voluntary resignation of their predecessors, and because for years past there had been a want of co-operation between the two houses of parliament.

Governor
Weld
accedes.

The governor, Mr. (afterwards Sir) F. A. Weld, in a memorandum dated May 11, 1877, reviewed the position of ministers. He admitted the reasonableness of their request, and consented to the dissolution. But in a subsequent despatch to the colonial secretary he took occasion to declare 'that in all cases the representative of the Crown should be more careful in granting a dissolution than the Crown might be in England, as he must sometimes be advised by ministers not sufficiently determined to waive small party advantages, somewhat accustomed occasionally to the sledge-hammer style of political warfare, and not uniformly imbued with that constitutional knowledge and spirit which often seems hereditary and is generally inherent in British statesmen.'

His excellency did not refer, in his memorandum, to the ques-

⁸ N. Zealand Parl. Pap. 1882, A. 5; *ib.* Deb. v. 41, p. 85.

tion of supplies, because he thought that 'the Crown ought not beforehand to express its decision upon a theoretical question not immediately before it,' and because 'he had no right to suppose that parliament would depart from the most usual and most constitutional course of voting necessary supplies for the period that must elapse before the meeting of the new parliament.' But he did not hesitate to say 'that nothing but the most extreme and clear public necessity would justify the Crown in dissolving after supplies had been refused.' And he privately notified the prime minister that, in the event of previous supply being now refused, he should require the administration to resign. The premier replied :—'I would not ask you, sir, to do anything that you consider to be contrary to your duty.' The supplies were accordingly voted.

Dissolution, provided supply is first voted.

The governor's memorandum was laid on the table of the assembly by ministers, and the house proceeded to criticise the contents of that document. They recorded their opinion that his excellency's statements, upon which he had agreed to allow the ministers a dissolution of parliament, were inaccurate, and that consequently the deductions therefrom were erroneous. This was unmistakably to impugn the governor's decision, and was a proof of the irregularity of the course taken by ministers in making public a document which should have been held as confidential, thereby exposing the governor to attack from their political opponents. His excellency, however, refrained from any attempt at self-justification, and would not allow himself to be drawn into controversy with the house of assembly. He dissolved parliament, and then wrote a despatch to the secretary of state for the colonies in explanation of his conduct. In reply he received a despatch expressing approval by her Majesty's government of his action in this matter. Pursuant to an address from the legislative council, this correspondence was communicated to the local parliament.^h

Governor charged with error by assembly.

In 1879 the Crowther administration (which replaced that of Mr. Giblin in December, 1878 ; Mr. Giblin having succeeded Mr. Fysh as premier, without any further change in the ministry in March, 1878),ⁱ finding themselves too weak to carry on the government in the existing house of assembly (a vote of want of confidence having been carried against them therein by a majority of one on October 18), applied to the governor to grant them a dissolution of parliament. The ministry, moreover, had been further weakened by the following resolution, which was carried in the legislative council on October 14, 1879 :—

Another Tasmania ministry asks for a dissolution.

^h Tasmania Leg. Coun. Jour. No. 19.

1877, Sess. 2, No. 45 ; *ib.* Sess. 4,

ⁱ *Ib.* 1878-79, No. 47.

Dissolu-
tion asked
in
Tasmania,

‘That the conduct of the Hon. W. L. Crowther, the premier of the colony, in promoting an appeal to the public of Tasmania (on behalf of Gertrude Kenny, late matron of the New Norfolk Asylum, who had been dismissed from her office by order of the asylum commissioners), in which grave reflections are made on the commissioners of the hospital for the insane, is unwarranted, highly unbecoming, and deserves the censure of this council.’

The ministerial memorandum presented to both houses was as follows :—

‘Ministers considered it their duty to ask for a dissolution for the following reasons :—

‘1. Parties being so equally divided in the present house, the difficulty, if not impossibility, of carrying on the government in a satisfactory manner appeared to them to warrant an appeal to the several constituencies.

‘2. That ministers having submitted a distinct policy, including direct taxation on property and income and the reform of the constitutional act, the country should be called upon to express an opinion favourable or otherwise of that policy.

‘3. That ministers were bound, in justice to their supporters and themselves, to evidence their willingness to submit both the policy and *personnel* of the administration to the verdict of the electors, as the present house had, by a majority of one, expressed its want of confidence in ministers.

‘The premier and the colonial secretary waited upon the governor, and asked for a dissolution on the grounds above stated, and expressed their belief that they were justified in making the application, and desirous at the same time that whatever decision his excellency might arrive at such application should be duly recorded.’

which
Governor
Weld
declines
to grant.

The governor in the following memorandum, addressed to the premier, declined to grant a dissolution :—

‘1. A vote of want of confidence in ministers having been carried in the house of assembly, they have asked for a dissolution.

‘2. The present house of assembly was elected a little over two years ago.

‘3. It was elected under the auspices, and the dissolution had been given at the request, of the party now in office.

‘4. I have no assurance or ground for belief that a general election would now materially alter the strength of parties.

‘5. No distinct division of parties in the house upon any question to be put to the country has been shown to my satisfaction.

The question of direct taxation was to some extent brought before the country at the last election, but appeared little to influence the result. An income-tax bill passed the house of assembly last session, and the principle of direct taxation has since been virtually reaffirmed by that house. Now I am asked to dissolve the assembly, and to appeal to the country on a financial policy which has never been rejected by that house, nor even by the legislative council this session.

Dissolu-
tion re-
fused in
Tasmania.

‘6. The question of the relations between the two houses has indeed been raised, but it has not taken a substantial form, or become a line of party demarcation.

‘7. The legislative council has this session expressed no opinion upon either of these two questions of policy.

‘8. In my opinion, the time has not yet arrived, even though it possibly may arrive, when these questions can be properly considered ripe for reference to the country as a test between one party and the other. Were a dissolution now granted, the real issue at a general election would be the personal question of confidence in certain members of the ministry as decided in the house, or of the opposition, and not questions of policy.

‘9. Considering all the circumstances of the case, I do not think that such an issue, though in some cases a sufficient ground for an appeal to the country, now warrants the dissolution of a comparatively young house of assembly, at a time when the financial position of the colony is admittedly suffering by the delay of urgently necessary measures, until it has been proved that the present parliament cannot furnish a ministry able to carry on the public business, more especially as new combinations are understood to have been under consideration by members of both parties, and divergences of opinion on political questions between opposite sides of the house do not seem rigidly defined or clearly irreconcilable.

‘10. It will moreover be in the recollection of the premier and of the colonial secretary that, before their assumption of office, I warned them that I was not prepared to grant a dissolution under existing circumstances without special and strong reasons being adduced; that I had taken the same course with Mr. Giblin, their predecessor, who, concurring with my view, did not ask for a dissolution.

‘Ministers will also observe, on reference to my memorandum of May 11, 1877, that most of the conditions which then led me to give their party a dissolution are now wanting, and consequently I am unable to accept their advice.

‘F. A. WELD.

‘Government House: October 18, 1879.’

Upon receipt of this memorandum the premier placed the resignation of ministers in his excellency's hands. Mr. Giblin was then sent for, and he succeeded in forming a new ministry.^j

Supply
always
granted in
England
before
dissolu-
tion.

Adverting to the observations contained in Governor Weld's despatch to the secretary of state of May 20, 1877, in reference to the necessity for a grant of supply by a colonial assembly in anticipation of a dissolution of parliament in consequence of a ministerial defeat, it may be stated that, in England, parliament has never hesitated to vote whatever supplies may be required for the public service. But upon a change of ministry, or other ministerial crisis, which may necessitate a speedy dissolution of parliament, it is obviously improper to ask the house of commons to vote either the whole amount, or to approve of all the details of the proposed estimates, and so commit parliament to the financial policy of a ministry whose fate is about to be determined by a general election. Under such circumstances, it is customary to limit the grant of supply to the amount absolutely required for ordinary expenditure until the reassembling of parliament. This affords, moreover, a guarantee that there will be no unnecessary delay in convening the new parliament.^k

Not
always in
colonies.

But, in the colonies, this most important principle has not been uniformly observed, as will appear from various cases recorded in this section.^l It is, however, gratifying to note that English usage in this particular is being gradually introduced into colonial practice.

Governor
Robinson
in New
South
Wales.

This question will be further elucidated on reference to the following case:—

In 1877 the governor of New South Wales (Sir Hercules Robinson) submitted to the secretary of state for the colonies a question

^j Tasmania Leg. Coun. Pap. 1879, No. 66; Assem. Votes, pp. 34-41.

^k Todd, Parl. Govt. v. 1, p. 486, new ed. p. 758.

^l And see Governor Normanby's despatch to the Earl of Carnarvon, dated Nov. 16, 1877, New Zealand Parl. Pap. 1878, A. 1, p. 4.

in regard to the exercise of the prerogative right of dissolving parliament, upon which the views of her Majesty's government as to the administration of this prerogative were specially desired, for the guidance of colonial governors.

It appears that it had become customary in New South Wales to delay the grant of the annual supplies until after the commencement of the year to which they were applicable. Sometimes this delay was protracted until eight or nine months of the new fiscal year had expired. Meanwhile, the services were carried on by temporary monthly supply bills, based on the estimates of the previous year. Frequently a ministerial crisis has arisen under such circumstances, and the request of the Crown for supply in furtherance of an intended dissolution has been met by obstruction or refusal. When thus obstructed by the assembly, ministers had obtained leave of the governor to dissolve parliament without any grant of supply. Once the services were paid by an arrangement with the government bank and without parliamentary authority.

Governor asks Imperial advice as to conditional promise of a dissolution.

The objections to such irregular practices are manifest. They operate injuriously upon public morality and upon the efficient administration of public affairs. They expose ministers and members of parliament alike to corrupt influences. They offer a strong inducement to the house to withhold supply in the endeavour to avert an expected dissolution, thereby threatening the very existence of parliamentary government.

Anxious to secure for the colony the benefit of English constitutional practice in such cases, Governor Robinson determined to withhold his consent to any application by ministers for authority to dissolve parliament until adequate provision had been made to defray the indispensable requirements of the public service in the interval which must elapse before the new parliament could meet ; or, at any rate, until every effort to obtain supply had been first exhausted.

Accordingly, on two occasions of the occurrence of ministerial crises, in the months of March and August, in 1877, his excellency approved of the advice of his ministers to dissolve parliament, but reserved to himself the right of reconsidering his decision in the event of their appeal to the house for the grant of supply preliminary to a dissolution being refused.^m

Pending the recurrence of a similar emergency, Governor Robinson was desirous of obtaining advice from competent consti-

^m See New South Wales Leg. Assem. Jour. 1876-77, v. 1, pp. 179, 184-193.

Dissolu-
tion
granted
con-
ditionally.

tutional authority in the mother country. He therefore wrote to the secretary of state for the colonies, on August 20, 1877, requesting to be informed whether the giving of a qualified or conditional acceptance to the advice of his ministers to dissolve parliament, was an exercise of the royal prerogative in unison with sound constitutional principles and with the permanent interests of the country; or whether, on the contrary, a governor was bound to give either an absolute acceptance or an absolute rejection to such advice.

In his reply, dated December 15, 1877, the secretary of state for the colonies (Earl Carnarvon) expressed his approval of Governor Robinson's endeavour to check the irregular practices of 'delaying to obtain supply, and of carrying on the government either without supply or upon temporary supply bills,' and his hope that the colony would become alive 'to the danger of practices which are inconsistent with the true spirit of representative government.'

Considering the constitutional question which had been raised by the governor as one of much interest and importance, Lord Carnarvon thought it desirable to consult Sir T. Erskine May and the speaker of the house of commons. The replies of these eminent and experienced gentlemen, together with the letter wherein the question was submitted to them for their consideration, were as follows:—

Opinions
of Sir
Erskine
May and
of
Speaker
Brand
sought.

Mr. Herbert to Sir T. Erskine May, K.C.B.

'(Confidential.)

'Downing Street: December 3, 1877.

'SIR,—I am directed by the Earl of Carnarvon to acquaint you that the governor of New South Wales has asked for his lordship's opinion upon a constitutional question which has arisen in the colony under his government.

'2. It appears that it is not unusual for a ministry in New South Wales to be without supply, and that ministers are content to accept this position, provided they can find any expedient or excuse for holding office under it.

'3. Sir H. Robinson desires to be informed whether, if whilst in this condition a political crisis arises and ministers advise a dissolution, the governor is bound either to accept or to reject this advice absolutely, or whether he would be justified in consenting to dissolve conditionally upon temporary supply being first obtained, if in his opinion the public interests should appear to render such a middle course desirable.

'4. Lord Carnarvon desires me to enclose a copy of the despatch in which Sir H. Robinson has submitted this question for consideration, accompanied by a paper which he has drawn up containing a

full statement of the circumstances attending the late ministerial crises in New South Wales, and of the action which he has taken on these occasions.

Dissolu-
tion
granted
con-
ditionally.

'5. It will be seen that on the last two occasions Sir H. Robinson has accepted the advice of his ministers to dissolve, but has reserved to himself the right of reconsidering his decision if supply were refused.

'6. Lord Carnarvon apprehends that from one point of view Sir H. Robinson may be considered to have been substantially right in the course he adopted. It would be the duty of the governor in a colony having parliamentary government on the English system to discountenance any course which would have even a tendency to render the executive government independent of supply, but his lordship also thinks that it may not unreasonably be contended, as a matter of argument, that in point of form it would have been better if in his answer to his ministers the governor had confined himself to the state of facts which had then arisen, and had not anticipated the future by giving a hypothetical decision; since, if he had informed his ministers that inasmuch as they had not got supply, he was unable to grant them a dissolution, he would not have laid himself open to the criticism that he was attaching a qualification or proviso to their advice, which it may be urged it was his duty to accept or reject without amendment.

'7. His lordship would, however, be greatly obliged if you would favour him with your opinion upon the whole subject.

'I am, &c.,

'ROBT. G. W. HERBERT.

'P.S.—Since the above was written Lord Carnarvon has received two further despatches, copies of which are enclosed, which seem to render it somewhat doubtful whether Sir H. Robinson can fairly be said to have attached a condition to his acceptance of the advice of his ministers on the question of dissolution.'

Sir T. Erskine May, K.C.B., to Mr. Herbert.

'House of Commons: December 6, 1877.

'SIR,—I beg to acknowledge the receipt of your letter of the 3rd instant, together with the correspondence and papers transmitted to me by direction of Lord Carnarvon, and I will briefly state my views upon the subjects referred to, as desired by his lordship.

Sir
Erskine
May's
reply.

'1. The first question raised by these papers is whether the governor of New South Wales, in giving a qualified assent to the advice of his ministers to dissolve parliament, adopted a constitu

Dissolu-
tion
granted
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ditionally.

tional course. It seems to me that as the power of dissolution rests absolutely with the governor, as representative of the Crown, he is entitled to insist upon such conditions as he may deem necessary for the public interests before he proceeds to exercise that power. He was therefore warranted in giving a qualified or conditional assent according to his own discretion.

‘2. At the same time the form in which his conditional assent was given appears open to some objections. His resolution being communicated by his ministers to the parliament, it practically gave to that body a veto upon its own dissolution, and even encouraged it to withhold the supplies. And, further, the governor took upon himself the responsibility of granting or refusing a dissolution, instead of laying that responsibility upon his constitutional advisers.

‘3. I think that the course more recently taken by the governor, in regard to Sir John Robertson’s administration, was entirely free from these objections, and was in every respect judicious and constitutional, according to the usage of the mother country.

‘4. To dissolve parliament before provision has been made for the public service is so serious an evil that the governor is entitled to the highest credit for his endeavours to discourage such a practice, and I have no doubt he will continue to discountenance it by every means in his power. But I should venture to suggest that in future the governor, after discussing with his ministers all the circumstances under which they advise a dissolution, including the financial situation and the probability of obtaining supplies, should either accept or decline their advice without conditions, or should defer his decision until every effort had been made to secure the supplies or to avert a dissolution.

‘5. It is to be hoped that the difficulties which have arisen, and the great public inconvenience caused by the present methods of providing for the public service in New South Wales, will lead to improved financial arrangements, and to the separation of questions relating to the supplies from the conflicts of political parties.

‘I am, &c.,

‘T. ERSKINE MAY.’

From the Speaker of the House of Commons to the Earl of Carnarvon.

‘Glynde, Lewes: December 10, 1877.

‘DEAR LORD CARNARVON,—I have received your letter of the 3rd inst., transmitting papers with reference to the recent political crisis in New South Wales.

‘I have also heard from Sir Erskine May that the same papers have been referred to him by your direction, and that he reported

Reply of
speaker
of house
of
commons.

his opinion at length in a letter of the 6th inst., a copy of which he has sent me.

Dissolution
granted
conditionally.

‘I have carefully gone through the papers, and I concur generally in the substance of Sir Erskine May’s report upon them.

‘I apprehend that there can be no doubt of the right of the governor, acting in the public interest, to qualify his acceptance of ministerial advice, although by so doing he incurs serious responsibility.

‘The course taken by Sir Hercules Robinson upon the recent occasion of a political crisis seems to have been thoroughly constitutional. He declined to accept, unconditionally, the advice of his ministers until he had endeavoured through other political arrangements to carry on the government, and when his several attempts had proved abortive he then acquiesced in the advice originally tendered by his ministers.

‘It appears to me that the governor and his ministers and the legislative assembly can never be placed in proper relationship so long as the present system prevails of deferring supply; for the governor ceases to be independent, the ministers are hampered by the constant need of temporary supply bills, and the house has a strong inducement to stop supply in order to prolong its own existence.

‘It is to be hoped that the complications arising out of the several crises occurring recently in New South Wales will open the eyes of the colony to the propriety of voting supplies more in accordance with the practice of the mother country.

‘Believe me, &c.,

‘H. BRAND.’

Subject to the reservations upon the point of form referred to in Sir Erskine May’s letter, Governor Robinson’s course upon this occasion must be approved. He is, undoubtedly, entitled to the highest credit for his judicious efforts to discourage the injurious practices hitherto prevalent in New South Wales, in the matter of supply, and to substitute for the same the constitutional usage of the Imperial parliament.

Governor
Robinson
sustained.

In February, 1878, the foregoing correspondence was laid upon the table of the legislative assembly.ⁿ

ⁿ New South Wales Leg. Assem. Votes and Proc. 1877-78, v. 1, p. 451. This correspondence is also given in Sir H. Robinson’s Speeches, App. pp. 239-259. In Victoria, in Jan. 1880, upon Mr. Berry failing

to carry his bill for the amendment of the constitution by the necessary majority in the assembly, he asked for a dissolution, and afterwards asserted that the governor had acceded thereto ‘unconditionally.’ Governor

Further
question
as to
supply
before
disso-
lution.

A further question, in relation to the grant of supply previous to a dissolution of parliament, arose in New South Wales in 1878. On December 3 the administration of which Mr. Farnell was premier was defeated in the legislative assembly upon their principal measure, the Crown lands bill, the motion for the second reading of which was negatived by a large majority.

The premier then requested Governor Robinson to permit him to appeal to the country by a dissolution. His excellency declined to grant this request, upon which the ministry resigned. The governor sent for Sir John Robertson, the nominal leader of the opposition, and commissioned him to form a new administration. He did so, and submitted a list of the proposed ministry for his excellency's approval.

At this juncture, Sir J. Robertson requested the outgoing premier to ask the assembly to vote certain necessary supplies, 'as it had been the practice for outgoing governments to do for incoming governments.' These supplies were meant to defray certain services to be incurred during the current financial year, including a sum of 50,000*l.* on behalf of an international exhibition about to be held in Sydney, the capital of the colony. Mr. Farnell complied with this request, and on receipt of a message from the governor recommending these appropriations the assembly proceeded to consider the matter in committee of supply. This committee reported a resolution, granting 86,500*l.* for certain specified services, but nothing for the international exhibition. Whereupon Sir John Robertson and his colleagues at once relinquished their attempt to form an administration.

The governor notified Mr. Farnell of this circumstance, and begged him to withdraw his resignation, and proceed with the business before parliament. On December 17 Mr. Farnell informed the assembly that he and his colleagues had deemed it their duty, in the public interest, at this critical period to comply with his excellency's request, and to resume their places.

The assembly, however, objected to this arrangement. On the following day they addressed the governor, intimating their unwillingness to proceed with the public business so long as the Farnell ministry remained in office. Upon which the ministry immediately retired, and the governor sent for Sir Henry Parkes, who for the previous year had taken no active part in the business

Normanby, however, corrected this error by reminding the premier, in a written memorandum, that the dissolution was granted 'as a direct appeal to the country on a specific measure.' The dissolution took place on Feb. 2, with a view to a speedy convening of the new parliament. The Colonies, Feb. 7 and 21, and March 6, 1880.

of parliament, and entrusted him (for the third time) with the formation of a government. Sir John Robertson gave his support to Sir Henry, which enabled him to form a strong administration.

Agreeably to former precedent, Mr. Farnell again invited the house to vote the supplies which the new ministry considered would be required before they could meet parliament. The standing orders were suspended for that purpose, and upon the receipt of the customary message from the governor, recommending a vote of credit to the necessary amount, the sum of 120,000*l.* was granted in committee of supply ; and no further obstacle was interposed by the assembly to the progress of public business.^o

The last precedent to be cited in illustration of the powers of a governor, in the exercise of the prerogative of dissolution, is one that occurred in the province of Quebec, upon the defeat, in the legislative assembly, of the Joly administration. It is peculiarly instructive as affording an example of the discharge—by a lieutenant-governor appointed by the dominion government of Canada—towards a provincial legislature of which he formed a component part, of the same constitutional powers, under responsible government, as those which pertain, under similar conditions, to the governor of a colony appointed directly by the Crown.

Dissolu-
tion
refused by
a Cana-
dian lieu-
tenant-
governor.

The Joly administration, of whose history some account has been given in a former chapter,^p were never able to command a majority in the legislative council. Recently that body had evinced their hostility to the ministry by stopping the supplies. A deadlock ensued. At length the nominal majority by which ministers were sustained in the assembly after the general election was transformed into a majority against them by the secession of certain of their former supporters, when an adverse vote against the ministry was carried by a majority of six.

Asked for
by M.
Joly in
Quebec.

Under these circumstances, M. Joly wrote to the lieutenant-governor requesting permission to appeal to the constituencies by a dissolution of the legislature. The result of his application was afterwards communicated to the legislative assembly as follows :—

Hon. M. Joly announced that he had the authorisation of the

^o New South Wales Votes and private information from the colony.
Proc. Dec. 3 to Dec. 20, 1878. And ^p See *ante*, p. 601.

Dissolu-
tion re-
fused in
Quebec.

lieutenant-governor to state that, when he had acquainted him with the result of the vote in the house, he had at the same time advised him to dissolve the house in view of immediate general elections. He had received this afternoon a reply from his honour, the lieutenant-governor, acknowledging receipt of his request, but, for certain reasons contained in his letter, refusing to grant it. He had therefore considered it to be his duty to proceed immediately to Government House and to tender to the lieutenant-governor his resignation and that of his colleagues, thanking his honour at the same time for the courtesy he had shown him. The resignation had been accepted, and he had been authorised by the lieutenant-governor to communicate the correspondence in question to the house. He then proceeded to read as follows :—

‘Quebec : October 30, 1879.

‘To his Honour

‘The Lieutenant-Governor of the Province of Quebec.

‘SIR,—I have the honour to inform you that the cabinet has been defeated by a majority of six votes upon a question which my colleagues and myself consider as a vote of non-confidence.

‘This vote is the result of the unconstitutional action of the legislative council, and I do not consider it as expressing the opinion of the majority of the people of the province of Quebec.

‘It is my duty to apply to your honour for a dissolution in view of an immediate appeal to the people.

‘I firmly believe that the result of an appeal to the people which I now ask for would be to give to this government a much larger majority than it has hitherto possessed.

‘Allow me to add that in my opinion the present circumstances make it very advisable that an immediate occasion should be afforded to the electorate of the province to pronounce on the constitutional question arising out of the action of the legislative council in connection with the supplies.

‘I have the honour to remain,

‘Your very obedient servant,

(Signed) ‘H. G. JOLY.’

‘Government House, Quebec : October 30, 1879.

‘To the Honourable

‘H. G. Joly, Premier of the Province of Quebec.

Refused
by Lieu-
tenant-
Governor
Robitaille.

‘The lieutenant-governor has the honour to acknowledge the receipt of the request made to him by the executive council, of which you are the head, to dissolve the present parliament. The lieutenant-governor does not overlook the embarrassment of the present situation, and he understands how important it is for him to be doubly

prudent and impartial in the midst of violent contentions which have divided public opinion for some time past.

Dissolu-
tion re-
fused in
Quebec.

‘The lieutenant-governor desires at once to call the attention of his ministers to the difference which exists between their position and his on a question such as that which is now at stake.

‘It must not be forgotten that the privilege of dissolving parliament is one of the most valued prerogatives of the sovereign, and that it is the right and duty of the representative of the Crown to control its exercise. Now the lieutenant-governor and the cabinet cannot look at the subject of this prerogative from the same point of view.

‘The first care of a government, under the political system which governs us, is to administer the affairs of the country for the best undoubtedly, but in all cases by means of a party ; while with the representative of the Crown parties count for nothing.

‘Although the lieutenant-governor is always disposed to lend the sanction of his authority to legislative or administrative acts which are evidently above all blame, and which every good administration might consider useful or necessary, he is strictly bound to inquire whether the extraordinary exercise of the royal prerogatives with which he is invested is demanded by the greater good of the province, as he is responsible towards the Crown for all political troubles and for all financial damage from which he might save the province and from which he does not save it.

‘When the lieutenant-governor received your request, what first struck him was the fact that since your assuming power you had already asked the Crown for a dissolution and obtained it. Two dissolutions for the same cabinet ! The extraordinary exercise of the most valued of the royal prerogatives granted twice to the same administration within an interval of a few months ! such was the first idea which presented itself to the mind of the lieutenant-governor. Immediately after your entry into office, you asked the Crown to dissolve parliament, and you had a general election. You issued from the electoral struggle with a majority, according to you ; with a minority, according to your opponents. But in point of fact you were enabled to govern at first with the vote of the speaker only, and subsequently with a majority varying from four to two votes ; and, in fine, you have announced to-day to the representative of the Crown that you find yourself in the house, resulting from the elections asked for by yourself, in a minority of six votes, and you claim a new dissolution.

‘Is it in the public interest that the province should be subjected so frequently to general elections ? Is it in accord with the spirit of the constitution that parliament should be dissolved so often ? Is

Lieutenant-Governor Robitaille's letter to 21. Joly.

the renewal at such brief intervals of the popular representation of a nature to ensure the stability and the good working of our political institutions ? To all these questions the lieutenant-governor deems it is duty to answer—No. The wise authority awarded to us by the constitution which we enjoy has decided that general elections for this province should take place every four years, and this period is not so long that it should be still further shortened without reasons of extraordinary gravity. The prime minister understands the deep and prolonged agitation into which a general election plunges society at large, as well as the divisions and the demoralisation which follow it. Apart from these political and social considerations, there are the financial considerations. A general election, and the session which a dissolution at this moment would render inevitable, would cost the country a hundred thousand dollars ; and, in the financial situation in which we are placed, this is an expenditure which deserves to be earnestly considered.

‘ However, if there were reasons sufficiently grave and serious to transcend all other considerations, the lieutenant-governor admits that a dissolution might be had recourse to. But do similar reasons exist in the present case ? A dissolution can have but one object, and that is to maintain in power certain men or certain parties. There would not be in this a sufficient compensation for the sacrifices which the country would be called upon to make. The lieutenant-governor is quite prepared to admit that the views of his ministers are of the highest character, and that the struggles which they have led have been inspired by the best motives ; but, when it becomes necessary to divide duties and responsibilities, each one must look upon the matter from his standpoint and perform the task which his position allots him. Under the present circumstances, one of the reasons which might be brought forward in support of an appeal to the people would be the necessity of restoring harmony between the two branches of the legislature. But this harmony is very nearly restored ; and, if there exists any other method than dissolution to complete the reconciliation of the council with the assembly, the lieutenant-governor considers that it is his duty to make use of it. The question for the lieutenant-governor to decide is not whether the government is to become the victim of what his advisers call an irresponsible body. So long as his ministers possessed the confidence of the popular branch of the legislature, he considered them as the representatives of the will of the people, and maintained them in their position contrary to the wish expressed by the legislative council. But now the majority which the government had in the legislative assembly has become a minority. The two branches of the legislature agree upon one of

the most important points—viz., a change of government, and it cannot be alleged that recourse must be had to extraordinary means to terminate a conflict which is in a fair way to be terminated by ordinary means. The necessity of restoring harmony in parliament could not, therefore, justify a dissolution after the recent vote of the legislative assembly, a vote which you consider as one of want of confidence. But you say you do not think this vote expresses the opinion of the people of this province. It is, however, the vote of the house of your choice, of the house elected under your auspices, under exceptionally favourable circumstances, after a dissolution asked for by you. And you would solicit the people to renew an assembly which you yourself caused to be elected eighteen months ago. The lieutenant-governor, taking into account these particular circumstances, cannot understand upon what basis rests the conviction which you manifest with respect to the result of new general elections. In fine, you declare that, in your opinion, the late events require that an immediate opportunity should be afforded to the people to pronounce upon the constitutional question raised by the action of the council in regard to the supplies. The lieutenant-governor sees no necessity of appealing to the people on this point. The absolute right of the council—at least such is the impression of the lieutenant-governor—is contested by no one, so that there only remains to be discussed the question of opportuneness. Now the representatives of the people, elected scarcely eighteen months ago, expressed their opinion upon this question before the adjournment of the house; and the fact that since that adjournment they have voted want of confidence in the administration does not reverse their previous verdict on the question at issue, and is not sufficient of itself to warrant a dissolution. It appears to the lieutenant-governor that there could be no more impolitic act than to revive by an altogether extraordinary proceeding a difficulty settled; and an appeal to the people just now could bear no other meaning.

‘For all these reasons, deeply penetrated with the feelings of his responsibility towards the Crown which he represents and towards the people of this province, the lieutenant-governor does not deem it his duty to make the use you ask him of the royal prerogative, having for its object a dissolution of the parliament.

‘THEODORE ROBITAILLE.’

Upon receipt of this excellent memorandum, the Joly administration resigned. The lieutenant-governor then sent for Mr. J. A. Chapleau, the leader of the opposition in the legislative assembly, and commissioned him to form a new ministry. He succeeded in this undertaking. The legislative council at once passed the supply

Dissolution refused in Quebec.

Joly ministry resigns.

Dissolu-
tion.

bill, and the provincial legislature was immediately prorogued. In his speech upon this occasion, the lieutenant-governor was able to express his congratulations upon the restoration of harmony between the legislative council and the legislative assembly, and his hope that a good understanding between the two branches of the legislature would continue to prevail.

In February 1883 Lieutenant-Governor R. D. Wilmot (of New Brunswick) refused a dissolution to Mr. Hannington, whose ministry had been condemned by a vote of the assembly on the address in answer to the speech at the opening of the second session of the legislature, on the ground that this assembly had been elected less than a year previous, and that 'the existing circumstances' were not sufficiently serious 'as to require an action which would involve the province in the turmoil, excitement and expense of a general election.' Whereupon the ministry resigned, and a new administration was formed, without delay or difficulty. ^a

From the foregoing precedents we may deduce certain general principles in regard to the exercise by a colonial governor of the prerogative of dissolving a colonial parliament or provincial legislature. These deductions, however, should be taken in connection with the principles already formulated at the beginning of this chapter, and which are primarily applicable to the sovereign in a parliamentary government.

Discretion
of a
governor
in grant-
ing or
refusing a
dissolu-
tion.

As the representative of the Crown in the dominion, colony, or province, over which he is commissioned to preside, the power of dissolution rests absolutely and exclusively with the governor or lieutenant-governor for the time being. He is personally responsible to the Crown for the lawful exercise of this prerogative, but he is likewise bound to take into account the welfare of the people, being unable to divest himself of a grave moral responsibility towards the colony he is commissioned to govern.

✓ Whilst this prerogative, as all others in our constitutional system, can only be administered upon the advice

^a N. Brunswick Assem. Jour. 1883, p. 31. See Sydney Morning Herald of Dec. 20, 1882, for discussion as to principles upon which a governor should exercise the prerogative of dissolution.

of counsellors prepared to assume full responsibility for the governor's decision, the governor must be himself the judge of the necessity for a dissolution. The 'constitutional discretion' of the governor should be invoked in respect to every case wherein a dissolution may be advised or requested by his ministers; and his judgment ought not to be fettered, or his discretion disputed, by inferences drawn from previous precedent, when he decides that a proposed dissolution is unnecessary or undesirable.

Governor's
discretion
in dissolu-
tion.

It is the duty of a governor to consider the question of a dissolution of the parliament or legislature solely in reference to the general interests of the people and not from a party standpoint. He is under no obligation to sustain the party in power if he believes that the accession to office of their opponents would be more beneficial to the public interest. He is therefore justified in withholding a dissolution requested by his ministers, when he is of opinion that it was asked for merely to strengthen a particular party, and not with a view to ascertain the public sentiment upon disputed questions of public policy. These considerations would always warrant a governor in withholding his consent to a dissolution applied for, under such circumstances, by a ministry that had been condemned by a vote of the popular chamber. If he believes that a strong and efficient administration could be formed that would command the confidence of an existing assembly, he is free to make trial thereof, instead of complying with the request of his ministers to grant them a dissolution as an alternative to their enforced resignation of office.

On the other hand, he may at his discretion grant a dissolution to a ministry defeated in parliament and desirous of appealing to the constituencies, notwithstanding that one or both branches of the legislature should remonstrate against the proposed appeal, if only

he is persuaded that it would be for the public advantage that the appeal should be allowed.

Prerogative of dissolution.

It is not expedient that the Crown should be required to decide beforehand upon any theoretical or hypothetical question not requiring to be immediately determined.^r Nevertheless, a governor is entitled to stipulate upon whatever conditions he may deem essential for the promotion of the public interests before he proceeds to exercise the power of dissolution. He may, therefore, defer his final decision upon an application for a dissolution of parliament until he has ascertained whether certain proposed conditions have been complied with, or whether it may be necessary that he should agree to modify the same.

When ministers advise a dissolution on the ground of disputes between the two houses of parliament, it behoves a governor to be cautious in acceding to such a request. It is not the duty of a governor to take sides with one branch of the legislature against the other, or to criticise the action of either house, in party conflicts. The two houses are presumably the best judges of the propriety of their own proceedings. It is only when disputes between them transcend the lawful bounds of parliamentary warfare, and seem to be irreconcilable by any other means, that a governor is justified in the attempt to invoke the aid of the people to restore harmony by dissolving the popular chamber.

In according to a ministry defeated in parliament—or recently appointed to office in the face of an adverse majority—the alternative of dissolution instead of

^r Governor Manners Sutton, of Victoria, refused, in 1868, to pledge himself, beforehand, to grant a dissolution, under certain hypothetical conditions, to gentlemen with whom he was negotiating for the forma-

tion of a ministry; and accordingly the negotiations failed. (See *ante*, p. 148.) See also Governor Head's decision, to the same effect, in 1858. (See *ante*, p. 766.)

resignation, a governor may, and ordinarily should, insist that ministers should meet the new parliament at the earliest possible period, for the purpose of determining the question whether or not they possess the confidence of the newly elected assembly.^s

Prerogative of dissolution.

Finally, if an existing administration be not prepared to accept the governor's decision in regard to a proposed dissolution, and to assume responsibility for the same, they are bound to resign office and give place to other ministers, who are willing to facilitate—and to become responsible to parliament and to the country for—the intended exercise of the royal prerogative.

^s But under particular circumstances the governor may see fit to approve of delay in convening the new parliament (see an example mentioned, *ante*, p. 383), unless the time of meeting is regulated by law (see *ante*, p. 779). And in New Zealand, in 1882, the governor authorised delay for special reasons (see *ante*, p. 784).

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CHAPTER XVIII.POSITION AND FUNCTIONS OF A COLONIAL GOVERNOR
REVIEWED.

DURING the brief but brilliant career of the late Sir Edward Bulwer-Lytton, as her Majesty's secretary of state for the colonies, he was required in 1859 to make choice of a capable person to serve as the first governor of the new colony of Queensland, which in that year was set apart, as a separate government, out of New South Wales. He selected for this responsible office Sir George Bowen, a gentleman with whom he had no personal acquaintance, but of whose ability and fitness for the post the reputation he had already acquired as government secretary in the Ionian Islands afforded sufficient proof.

Sir B.
Lytton's
letter to
Sir G.
Bowen.

In tendering to Sir George Bowen this promotion, Sir E. Bulwer-Lytton addressed him a letter, professedly containing mere 'desultory hints' for his guidance in his new appointment, but to which Sir George afterwards referred as an admirable compendium of the duties of a colonial governor—to the study of which he attributed in no slight degree whatever measure of success had attended upon him as governor of Queensland and afterwards of New Zealand, in both of which colonies he proved himself to be a very able and popular administrator.

A few passages from this letter may be quoted, as they express ideas which may be profitably pondered by all colonial governors :—

Good
advice to
colonial
governors.

Remember that the first care of a governor in a free colony is to shun the reproach of being a party man. Give all parties and all the ministries formed the fairest play.

Mark and study the idiosyncrasies of the community : every community has some peculiar to itself. Then in your public addresses appeal to those which are the noblest : the noblest are always the most universal and the most durable. They are peculiar to no party.

As soon as possible exert all energy and persuasion to induce the colonists to see to their self-defence internally. . . . A colony that is once accustomed to depend on Imperial soldiers for aid against riots, &c., never grows up into vigorous manhood.

Do your best always to keep up the pride in the mother country. . . . Sustain it by showing the store set on integrity, honour, and civilised manners ; not by preferences of birth, which belong to old countries.

As you will have a free press, you will have some papers that may be abusive. Never be thin-skinned about these : laugh them off. Be pointedly courteous to all editors and writers, acknowledging socially their craft and its importance. The more you treat people as gentlemen, the more 'they will behave as such.'

After all men are governed as much by the heart as by the head. Evident sympathy in the progress of the colony ; traits of kindness generosity, devoted energy, where required for the public weal ; a pure exercise of patronage ; an utter absence of vindictiveness or spite ; the fairness that belongs to magnanimity—these are the qualities that make governors powerful, while men merely sharp and clever may be weak and detested.

But there is one rule which I find pretty universal in colonies. The governor who is the least huffy, and who is most careful not to overgovern, is the one who has the most authority. Enforce civility upon all minor officials. Courtesy is a duty public servants owe to the humblest member of the public.

Sir E. Bulwer-Lytton adds to these wise precepts of political morality earnest advice to the governor upon practical matters—such as the need of mastering thoroughly the details of public questions ; of being watchful over 'the paramount object of finance and the administration of revenue' ; and of striving to convert local jealousies between adjacent colonies into wholesome emulation.^a

^a Lord Lytton's Memoir and Speeches, v. 1, pp. 121-124.

These were the ideas of a high-minded English statesman, anxious to build up the colonial empire of Great Britain upon the stable foundations which had secured honour and renown to the parent state. He recognised therein the authority and influence appertaining to the office of governor and its appropriate functions in elevating the tone of public sentiment, and stimulating colonial statesmen to the loftiest aims in their efforts to promote the public good.

Merivale
on a
governor's
functions.

With a similar object Mr. Herman Merivale, who was permanent under-secretary of state for the colonies during twelve eventful years in colonial annals (1847-59), in an edition of his valuable 'Lectures on Colonisation and Colonies,' published in 1861, thus comments upon 'the very critical and peculiar functions' of a colonial governor, under 'responsible government':—

'He constitutes the only political link connecting the colony with the mother country. So far as regards the internal administration of his government he is merely a constitutional sovereign acting through his advisers; interfering with their policy or their patronage, if at all, only as a friend and impartial councillor. But whenever any question is agitated touching the interests of the mother country—such, for instance, as the imposition of customs duties, or the public defence—his functions as an independent officer are called at once into play. He must see that the mother country receives no detriment. In this duty he cannot count on aid from his advisers: they will consult the interests either of the colony or of their own popularity; he may often have to act in opposition to them, either by interposing his veto on enactments or by referring those enactments for the decision of the home government. But for these purposes the constitution furnishes him with no public officers to assist him in council or execution,

or to share his responsibility. The home government looks to him alone.' ^b

Merivale
on a
governor's
functions.

Again, 'under responsible government' [a governor] 'becomes the image, in little, of a constitutional king, introducing measures to the legislature, conducting the executive, distributing patronage, in name only, while all these functions are in reality performed by his councillors. And it is a common supposition that his office is consequently become one of parade and sentiment only. There cannot be a greater error. The functions of a colonial governor under responsible government ^{*} are (occasionally) arduous and difficult in the extreme. Even in the domestic politics of the colony his influence as a mediator between extreme parties and controller of extreme resolutions, as an independent and dispassionate adviser, is far from inconsiderable, however cautiously it may be exercised. But the really onerous part of his duty consists in watching that portion of colonial politics which touches on the connection with the mother country. Here he has to reconcile, as well as he can, his double function as governor responsible to the Crown, and as a constitutional head of an executive controlled by his advisers. He has to watch and control, as best he may, those attempted infringements of the recognised principles of the connection which carelessness or ignorance, or deliberate intention, or mere love of popularity, may from time to time originate. And this duty, of peculiar nicety, he must perform alone. . . . His responsible ministers may (and probably will) entertain views quite different from his own. And the temptation to surround himself with a *camarilla* of special advisers, distinct from these ministers, is one which a governor must carefully resist.

^b Merivale, Lectures delivered Colonisation, &c., new ed. enlarged, before the University of Oxford on 1861, p. 649.

It may, therefore, be readily inferred that to execute the office well requires no common abilities, and I must add that the occasion has called forth these abilities.’^e

A further testimony has been lately borne to the important functions fulfilled by a modern constitutional governor, by a colonial statesman of much local experience in public affairs. Mr. (now Sir William) Fox, formerly premier in New Zealand, in an address before the Royal Colonial Institute, on May 23, 1876, expressed himself on this subject as follows:—

‘The position of governors in self-governing colonies is now analogous to that of her Majesty in this country. The business of governing is done by the ministers, and it is only in extreme cases, where a governor may dismiss his ministers (subject to the control of parliament), or cases where Imperial rights are involved, and perhaps in the prerogative of mercy, in cases of life and death, that the governor can act independently of his ministers. Still, the governor is not reduced to a mere dispenser of viceregal hospitalities, which I am bound to say they do dispense with a very liberal hand. If a governor is an educated man, has common sense, and is familiar with political principles and precedents, he may be of much use in advising with his ministers, though it would be highly improper for him to take a side in party politics, or engage in political intrigues. It is his duty also to set a high social example, and to interest himself not only in the general progress of the colony, but, as far as possible, in the personal welfare and prosperity of the colonists engaged in the great battle of colonial life. And they generally do exhibit much sympathy in these matters. They make periodical “progresses” through the colony over which they

Sir W.
Fox on a
governor's
position.

^e Merivale, *Lectures on Colonisation*, &c., p. 666.

rule, and are hospitably entertained in the centres of population.'^d

British statesmen of various shades of political opinion have used similar language, more emphatically expressed, in reference to the position occupied by constitutional governors under the British Crown.

Thus, Lord Elgin, in words already quoted, dwells pointedly upon the weight and influence attributable to this office, and upon the beneficial results which a governor can produce in the arena of colonial politics, without deviating from the strict line of his official duty.^e Elsewhere, adverting to the altered position of a governor, as the Imperial executive gradually withdraws from direct interference in colonial concerns, he says, 'the office of governor tends to become—in the most emphatic sense of the term—the link which connects the mother country and the colony, and his influence the means by which harmony of action between the local and Imperial authorities is to be preserved.' From his independent and impartial position, the opinion of a governor must needs have 'great weight in the colonial councils; while he is free to constitute himself in an especial manner the patron of those larger and higher interests—as of education, and of moral and material progress in all its branches—which, unlike the contests of party, unite, instead of dividing, the members of the body-politic.'^f

Lord Elgin on a governor office.

The Duke of Buckingham, when secretary of state

^d Royal Col. Inst. Proc. v. 7, p. 252.

^e See *ante*, p. 78. See also Sir George Bowen's observations, with the Duke of Newcastle's comments thereon, *ante*, pp. 89-92; and the Duke of Argyll's remarks, in Hans. Deb. v. 191, p. 2001. Also, Sir Hercules Robinson's speech on the functions of a constitutional gover-

nor, in *The Colonies*, Feb. 7, 1880.

^f These sagacious words form the closing sentence of the last official despatch written by the Earl of Elgin on relinquishing the government of Canada. They were dated from Quebec, on Dec. 18, 1854. Walrond's *Letters of Lord Elgin*, pp. 126-128.

Governor-general of Canada.

for the colonies, in 1868, thus wrote, in a despatch concerning the office of governor-general of Canada. He 'is the representative of the Queen, and the highest authority in a dominion vast in extent, occupied by several millions of people, comprising within itself various provinces recently brought together, which can only be knit into a mature and lasting whole by wise and conciliatory administration. Nor is the position insulated. The governor-general is continually called upon to act on questions affecting international relations with the United States. The person who discharges such exalted functions ought to possess not only sound judgment and wide experience, but also an established public reputation. He should be qualified both to exercise a moderating influence among the different provinces composing the union, and also to bear weight in his relations with the British minister at Washington and with the authorities of the great neighbouring republic.'^s

Lord Dufferin as a constitutional governor.

Upon the expiration of Lord Dufferin's term of service as governor-general of Canada, in 1878, a joint address was presented to his excellency by both houses of the dominion parliament, which bore testimony to the ripe wisdom, experience, and eminent abilities displayed by that accomplished statesman in his administration of the government of Canada. Special mention

^s This despatch was written to explain the reasons why her Majesty's government felt it to be their duty to advise the Queen to refuse her assent to a bill passed by the dominion parliament to reduce the salary of the governor-general, which had been fixed by the British North America act, 1867, sec. 105, at £10,000 sterling (Canada Sess. Pap. 1869, No. 73). For the salaries now payable to all colonial governors, see Col. Office List, 1892, p.

14. For the governors' pensions, see Imperial acts, 28 & 29 Vic. c. 113, and 35 & 36 Vic. c. 29. See also correspondence concerning the heavy expenses entailed upon the governor of Victoria in discharging the duties of official hospitality in that colony. Victoria Assem. Pap. 1877-78, v. 3, No. 101. See also Report of Sel. Com. of Leg. Coun. of Tasmania, on Feb. 26, 1880, on the governor's salary bill, Tasmania Leg. Coun. Pap. No. 91.

was made in this address of the zeal and devotion manifested by Earl Dufferin upon all occasions wherein it had been in his power to promote Canadian interests ; to his efforts and liberality in fostering literature, art, and the industrial pursuits ; and to the beneficial results which had attended his visits to each of the provinces and territories of the dominion, for the purpose of familiarising himself with their distinctive resources, and with the character of the inhabitants ; and in availing himself of every opportunity to enlarge on these topics in eloquent speeches, which had attracted attention throughout the empire, and contributed largely to an increased knowledge of Canada, its present condition and future prospects. Sir M. Hicks-Beach, her Majesty's colonial secretary, in a despatch to the Earl of Dufferin, dated Oct. 15, 1878, congratulating his lordship upon the estimation in which he was held by all classes in Canada, conveyed the Queen's commands signifying the high appreciation entertained by her Majesty of the great ability and judgment with which he had discharged the duties of governor-general. The secretary of state added an expression, on the part of her Majesty's government, of their conviction that the admirable manner wherein his lordship had fulfilled the duties of the Queen's representative had done much to strengthen and deepen in the hearts of the Canadian people that spirit of loyalty and devotion to the British Crown and empire, of which there had been so many gratifying indications.^h

Lord
Dufferin
as a con-
stitutional
governor.

Our object in referring to these pleasing reminiscences of the administration of Lord Dufferin in Canada is not merely to record the high estimation in which his lordship was held—alike by the Crown, the parlia-

^h Canada Com. Jour. April 11, 1878 ; Dominion Off. Gaz. Nov. 9, 1878.

ment, and the people—as a constitutional governor, but likewise to exemplify, by such a conspicuous and distinguished example, the appropriate field of action for a representative of the sovereign in a self-governing community.

Benefits
accruing
from a
governor's
office.

For, while a constitutional governor suitably abstains from direct interference with the ordinary course of public business, he has numerous opportunities of conferring substantial benefits upon the colony over which he presides, and of strengthening the tie which connects it with the mother land.

It is pre-eminently his duty to acquaint himself, by personal observation, with the country and its capabilities, and to ascertain by individual intercourse the condition of its inhabitants, and the quality, aim, and efficiency of its various local institutions. In his official tours for this purpose a governor would naturally be called upon to make frequent response to loyal addresses of respect and welcome. In such utterances, in the delivery of speeches upon public occasions of a non-political character, and in his despatches to the secretary of state, a governor is at liberty, from time to time, to direct attention, with the authority and impartiality becoming his office, to numerous questions of public concern, as, for example, the peculiar advantages presented by the colony as a field for emigration or for the profitable employment of capital. He can likewise promote—by timely words of encouragement, of warning, or of judicious counsel—the varied and complex interests of a rising, industrious, and progressive community; pointing out, in a paternal spirit, the pitfalls and temptations to be avoided, as well as the rewards to be anticipated from perseverance in well-doing, and from the cultivation of harmony and mutual forbearance in every relation of life.¹

¹ For unequalled specimens of public addresses by a colonial gover-

Bearing in mind that the governor in a British province is a connecting link between the distant portions of a wide-spread empire and the august person of its monarch, who is everywhere honoured and beloved, and that his office is a symbol of the unity which prevails between the scattered members of a vast and powerful nationality, a constitutional governor is in duty bound to foster, within his own sphere, loyalty and devotion to the sovereign and attachment to the institutions of monarchy—which secure to the people the inestimable benefits of liberty, protection, and advancement, in a higher degree than is afforded by any other form of government upon earth.

Obligations of a governor.

Furthermore, the exalted position occupied by a governor under the British Crown enables him, after the pattern exhibited by the Queen—in the order and decorum of her royal court, and in the exercise of her great personal influence^j—to encourage public and private morality, and to enforce the paramount obligations of religion amongst the people, so far as he justly may, in a country which possesses no established church, and where all Christian denominations are upon a footing of equality.

These considerations, however, while they cannot

nor, upon every imaginable subject appropriate to his position, and fraught with instruction and wholesome advice applicable to all classes and conditions of the people, we would refer to those delivered by Lord Dufferin during his administration in Canada. These are included in Mr. Leggo's *Administration of Lord Dufferin in Canada*, published in 1878, and H. Milton's collection of his lordship's speeches and addresses, which was published in 1882. Of much value and interest, also, are the speeches delivered during his occupancy of the post of governor-general of Canada, in 1878

to 1883, by the Marquis of Lorne, which were published in Montreal in 1884, after his departure from the dominion. Admirable addresses, upon various questions of public concern, disconnected with party politics, have been delivered by other colonial governors in Australia, and elsewhere, with very beneficial effect. See especially the speeches delivered by Sir Hercules Robinson, during his administration of the government of New South Wales (1872–1879), which were published at Sydney in 1879.

^j See Todd, *Parl. Govt.* v. 1, p. 203, new ed. p. 308.

Political
functions
of a
governor.

be overlooked or overestimated in reviewing the beneficial effects of monarchical rule, as administered by a constitutional governor under the British Crown, are foreign to the special scope of this treatise. It has been the aim of the present writer to define, with the utmost possible precision and impartiality, the actual position and functions of a governor in his political relations, so far as the same are capable of being determined by reference to authoritative documents and other unimpeachable sources of knowledge.

In the admirable summaries of the duties of a governor, quoted at the commencement of this chapter from the writings or speeches of men of reputation and experience in public affairs, we find but slight allusion to his essentially political functions. This subject, however, is of vital importance; and it is with a view to supply this deficiency that the present work has been undertaken.

The general conclusions arrived at in the preceding chapters, after a careful investigation of the several questions therein discussed, may be briefly epitomised as follows:—

A local
constitu-
tional
sovereign.

1. The position of a governor in a colony possessing representative institutions, with 'responsible government,' is that of a local constitutional sovereign. Whatever other powers may be conferred upon him by the law of the particular colony, he is, by virtue of his commission and instructions from the Crown, the representative of the Queen in this part of her dominions, who is herself the source of all executive authority therein. He has his responsible ministers, who advise him upon all acts of executive government and in all legislative matters.^k The identity of aim and the mutual co-operation in endeavour which must invari-

^k Sir T. Erskine May, in *Com. Pap.* 1878-79, v. 8, pp. 190, 191.

ably subsist between the representative of the Crown and his constitutional advisers is a pledge and assurance to the people that they enjoy the full benefit and security which the monarchical element is capable of affording in our colonial system, combined with the advantages of ministerial control and responsibility.¹

2. A constitutional governor should never be held accountable, within the sphere of his government, for the policy or conduct of public affairs. This responsibility devolves unreservedly upon his ministers, who share with him in the functions of sovereignty which he exercises under his commission from the Crown, on condition that they assume full responsibility for the same before the local parliament and the constituent body. The governor is personally responsible only to the supreme power from whence his authority is derived.

His responsibility.

3. The position of a constitutional governor towards those over whom he is set as the representative of the sovereign, and especially in relation to his ministers, is one of strict neutrality. He must manifest no bias towards any political party, but on the contrary be ready to make himself a mediator and a moderator between the influential of all parties; and he must be uniformly actuated solely by a desire to promote the general welfare of the province or dependency of the empire committed to his charge.

No partisan.

4. A constitutional governor is bound to receive as his advisers and ministers the acknowledged leaders of that party in the state which is able for the time being to command the confidence of a majority of the popular assembly;^m or, in the last resort, of the people, as expressed on appeal through their representatives in the

His political advisers.

¹ See Walrond, Letters of Lord Elgin, pp. 120-124. And see *ante*, p. 16.

^m See *ante*, p. 68.

local parliament. And it is his duty to cordially advise and co-operate with his ministers in all their efforts for the public good.

Ministers' advice should ordinarily prevail.

5. In furtherance of the principle of local self-government and of the administration of the executive authority in harmony with the legislative bodies, it is ordinarily the duty of a constitutional governor to accept the advice of his ministers for the time being in regard to the general policy and conduct of public affairs; in the selection of persons to fill subordinate offices in the public service; and in the determination of all questions that do not require to be disposed of in conformity with special instructions from the Imperial government.

Governor's intelligent consent always necessary.

6. In order to enable a constitutional governor to fulfil intelligently and efficiently the charge entrusted to him by the Crown, he is bound to direct—as by his commission and instructions he is authorised to require—that the fullest information shall be afforded to him by his ministers upon every matter which at any time shall be submitted for his approval; and that no policy shall be carried out or acts of executive authority performed by his ministers in the name of the Crown, unless the same shall have previously received his sanction.

His reserved right of disapproval.

✓ 7. While, as a general rule, a constitutional governor would naturally defer to the advice of his ministers, so long as they continue to possess the confidence of the popular chamber, and are able to administer public affairs in accordance with the well-understood wishes of the people, as expressed through their representatives, if at any time he should see fit to doubt the wisdom or the legality of advice tendered to him, or should question the motives which have actuated his advisers on any particular occasion—so as to lead him to the conviction that their advice had been prompted

by corrupt, partisan, or other unworthy motives, and not by a regard to the honour of the Crown or the welfare and advancement of the community at large—the governor is entitled to have recourse to the power reserved to him in the royal instructions, and to withhold his assent from such advice. Under these circumstances, he would suitably endeavour, in the first instance, by suggestion or remonstrance, to induce his ministers to modify or abandon a policy or proceeding which he was unable to approve. But if his remonstrances should prove unavailing, the governor is competent to require the resignation of his ministers or to dismiss them from office, and to call to his councils a new administration.

Governor's
right of
remon-
strance.

8. The circumstances under which a governor would deem it discreet and advisable to have recourse to his reserved right of dismissing a ministry must be determined by himself, with due regard to the gravity of the proceeding, and to the responsibility it would entail upon him to the Crown. But this prerogative right can only be constitutionally exercised on grounds of public policy, and for reasons which are capable of being explained and justified by an incoming administration to the local assembly, as well as by the governor himself to the Imperial authorities.

And of
changing
his
ministers.

9. Upon a change of ministry it is essential that the gentlemen who may be invited by the governor to form a new administration shall be unreservedly informed by him of the circumstances which led to the resignation or dismissal of their predecessors in office; and that they shall be willing to accept entire responsibility to the local parliament for any acts of the governor which have been instrumental in occasioning the resignation or effecting the dismissal of the outgoing ministry. For it is an undoubted principle of English law, that no prerogative of the Crown can be constitutionally

New
ministry
respon-
sible for
his act.

Minis-
terial
responsi-
bility.

exercised unless some minister of state is ready to assume responsibility for the same. Hence the authority itself remains inviolate, however the propriety of its exercise may be questioned, or its use condemned. The authority of the Crown, in the hands of the Queen's representative, must invariably be respected; and no one subordinate to the governor should attribute to him personally any act of misgovernment, his ministers being always answerable for his acts to the local parliament and to the constituent body.

Preroga-
tive of
dissolu-
tion.

10. A constitutional governor is personally responsible to the Crown for his exercise of the prerogative right of dissolving parliament; and he is bound to have regard to the general condition and welfare of the country, and not merely to the advice of his ministers, in granting or refusing a dissolution. And, should he deem it advisable to insist upon the dissolution of an existing parliament contrary to the advice of his ministers, he is not debarred from taking steps to give effect to his decision, because his ministers for the time being are sustained by a majority of the local assembly; although such an act, on the part of the governor, would necessarily involve their resignation of office. But no governor has a constitutional right to proceed to dissolve parliament under such circumstances, unless he can first obtain the services of other advisers, who are willing to become responsible for the act; and unless he has reasonable grounds for believing that an appeal to the constituent body would result in an approval by the new assembly of the policy which, in his judgment, rendered it necessary that a dissolution of parliament should take place.

Verdict of
the people
must
prevail.

11. In the ultimate determination of all questions wherein a constitutional governor may see fit to differ from his ministers, the declared intention of the Queen, that 'her Majesty has no desire to maintain any system

of policy among her North American subjects which opinion condemns 'ⁿ—a principle which is equally applicable to every self-governing colony, and which has been freely conceded to them all—requires that the final verdict of the people in parliament must be accepted as conclusive; and that the governor must be prepared to accept an administration who will give effect to this verdict, or else himself surrender to the sovereign the charge with which he has been entrusted.

12. It is inexpedient and objectionable in principle that a constitutional governor should take any part in controversies between the legislative chambers in the colony upon questions of privilege, or concerning the relative powers of the two houses under the constitution, so long as the rights of the Crown are not involved in such disputes. If he should ultimately see fit to dissolve parliament with a view to the determination of protracted legislative disputes, it must be clearly seen that he intervenes for the purpose of mediation, and as an appeal to the arbitration of the people, and not as helping one house against the other.

Non-interference between two houses.

13. In questions of an Imperial nature, wherein the reputation of the British Crown is concerned, or the general policy of the empire is involved—as, for example, in the administration, by a governor, of the prerogatives of mercy or of honour; or the reservation, under the royal instructions, of certain bills which had passed both houses of the local parliament, for the signification of the Queen's pleasure thereon—it is the duty of a governor to exercise the power vested in him, in his capacity as an Imperial officer, without limitation or restraint. Nevertheless, upon such occasions, a con-

Imperial questions.

ⁿ Lord John Russell's despatch 1839; Canada Assem. Jour. 1841, to Governor Thomson, of Oct. 14, App. B. B.

Responsi-
bility of
local
ministers
thereon.

stitutional governor should afford to his ministers full knowledge of his intentions, and an opportunity of tendering to him whatever advice in the premises they may desire to offer; albeit the governor is bound, by his instructions and by his obligations as an Imperial officer, to act upon his own judgment and responsibility, whatever may be the nature of the advice proffered to him by his ministers. In all such cases the responsibility of the local ministers to the local parliament would naturally be limited. They would be responsible for the advice they gave, but could not strictly be held accountable for their advice not having prevailed. For, 'if it be the right and duty of the governor to act in any case contrary to the advice of his ministers, they cannot be held responsible for his action, and should not feel themselves justified on account of it in retiring from the administration of public affairs.'^o

√ But, according to constitutional analogy, no such right should be claimed by the governor, except in cases wherein, under the royal instructions, he is bound as an Imperial officer to act independently of his ministers. And if his discharge of this duty should be felt, at any time, as a grievance, either by his own advisers or by the local parliament, it would be a reasonable ground for remonstrance or negotiation with the Imperial government; but it could not, meanwhile, absolve the governor from his obligations to the Queen, under the royal instructions. It is, nevertheless, supposable, in an extreme case, that the local parliament might assume the right of censuring a ministry for advice given upon an Imperial question, or because

^o Lord Carnarvon's view of the position of a responsible ministry in a colony, under the circumstances stated in the text; cited in Canada Sess. Pap. 1876. No. 116, p. 82. And see *ante*, pp. 348-355.

they did not resign upon a particular occasion when their advice was not followed.^p

With reference to the foregoing text, a recent case occurred in New Zealand, which resulted in a difference between the governor and his advisers in the matter of appointments to the legislative council. Difficulty in New Zealand.

The official papers ^q concerning this difficulty were received too late to make mention of it in the previous chapter, where the subject might be more appropriately noticed,^r but a brief narration of the circumstance will not be out of place here.

Pending the result of a general election held in that colony, in the fall of 1890, the Atkinson ministry recommended the appointment of eleven members to the upper house, whose numbers, it appears, are not defined under the constitution.

The governor declined to sanction this increase, but consented to the creation of the speaker and six councillors, an alternative that was ultimately accepted. These appointments the governor afterwards explained were made more with the object of strengthening the character of the upper house than for party purposes.

It transpired that the ministry, by the election returns, were actually in the minority before the appointments were made; and statements having appeared in the public press to that effect, protests were addressed to the governor by over forty members of the house of representatives and others against his accepting the advice of ministers no longer possessing the confidence of the people.

On the other hand, the governor in accepting ministerial advice justified his course to the colonial secretary on the ground that he did 'not think it is seriously maintained, in the face of the constant practice in England for defeated ministers to advise her Majesty to create peers, that there has been anything unconstitutional in my action; but so far as I can gather there is a strong feeling in the colony that the practice which obtains in England of making ministerial appointments before vacating office is not one which New Zealand ministers should be encouraged to follow.'^s

After the elections and before parliament met the Atkinson administration resigned, and the new ministry of which Mr. Ballance was premier succeeded to office. In February, 1892, the Ballance ministry submitted to the governor eighteen names for appointment to the legislative council, claiming that of this number they were entitled to make seven appointments to counterbalance

^p See a precedent of this kind, but which did not lead to the resignation of ministers, *ante*, p. 358.

^q Com. Pap. 1893, No. 198.

^r *Ante*, p. 658.

^s Com. Pap. 1893, No. 198, p. 12.

Difficulty
in New
Zealand.

those granted to their predecessors,^t the rest to fill vacancies and allow for a few creations.

The governor, the Earl of Onslow, declined to adopt this advice, and desired that the question might be deferred for the consideration of his successor, the Earl of Glasgow, whose appointment had been announced, as his stay in the colony would not enable him to see the end of consequences which a persistent refusal to accept the advice of ministers would entail.^u

Accordingly, on the arrival of the new governor in June, 1892, ministers lost no time in advising an increase to the upper house, this time of twelve members, on the ground that the government was in an unbearable position in the legislative council, where they had but four or five supporters, and 'that no government can carry on the business of the house satisfactorily when in one chamber they exist only on sufferance.'^v

The governor declined to appoint this number, fearing that in so doing he would be running the risk of making the legislative council a mere echo of the other house, and thus destroy its independence; but he consented to an increase of eight members. This concession did not meet the requirements of ministers, who continued to press their claims for twelve appointments, while the governor, equally firm, objected to that number; and in so doing he was in accord with the views entertained by his predecessor, who had embodied the same in a confidential memorandum for the information of his successor.

Finally, ministers, in a memorandum dated August 5, 1892, appealed to the colonial secretary on the difference existing between them and the governor. After setting forth the facts of the case, they justified their action in having remained in office, though their advice had not been accepted by his excellency, as follows:—

'Ministers would point out that the parliament is in session, and they are answerable to the house of representatives for the advice tendered to his excellency. It has been alleged that they ought to have resigned when their advice was declined, but they relied on the constitutional practice as expressed in "Todd's Parliamentary Government in the British Colonies," p. 590 (old edition), which is as follows:—"They would be responsible for the advice they gave, but could not strictly be held accountable for their advice not having prevailed; for if it be the right and duty of the governor to act in any case contrary to the advice of his ministers, they cannot be held responsible for his action, and should not feel themselves justified in retiring from the administration."'

In a despatch addressed to the governor, dated September 26,

^t Com. Pap. 1893, No. 198, p. 23.

^u *Ib.* p. 24.

^v *Ib.* p. 14.

1892, the colonial secretary, the Marquess of Ripon, replied that, while fully appreciating the difficulties surrounding the case, he had no hesitation in advising the acceptance of ministerial advice on the question at issue, adding :—

Difficulty
in New
Zealand.

‘When questions of a constitutional character are involved it is especially, I conceive, the right of the governor fully to discuss with his ministers the desirability of any particular course that may be pressed upon him for his adoption. He should frankly state the objections, if any, which may occur to him ; but if, after full discussion, ministers determine to press upon him the advice which they have already tendered, the governor should, as a general rule, and when Imperial interests are not affected, accept that advice, bearing in mind that the responsibility rests with the ministers, who are answerable to the legislature and, in the last resort, to the country.’^w

On the receipt of this despatch the governor waived his objection, and the appointments were accordingly made.

14. While it is objectionable in principle, and of rare occurrence in practice, that appeals should be made to the Imperial parliament, in cases of difference between a governor and the colonial executive or legislature over which he presides, or has presided—so as to lead to the renewal in the British parliament of local political contests—yet the authority of the Imperial parliament to discuss all questions affecting the interests of any portion of the empire, the honour of the Crown, or the welfare of her Majesty’s subjects in any part of the globe, and to advise the Crown upon the same, is unquestionable ; and a governor or ex-governor of a British province must never lose sight of his responsibility, not merely to the Crown in council, but likewise to both houses of the Imperial parliament, by whom he is liable to be censured or impeached for misconduct in office.^x

Responsi-
bility to
Imperial
parlia-
ment.

^w Com. Pap. 1893, No. 198, p. 40.

^x See *ante*, pp. 36, 37 ; Earl Grey, Hans. Deb. v. 103, p. 1280 ; Mr. Gladstone, *ib.* v. 104, p. 356 ; Case of the Governor of British Guiana, *ib.* v. 107, p. 930. Debates in Parliament upon the conduct of

Governor Eyre, of Jamaica, in 1866 and 1867 ; of Governor Darling, of Victoria, in 1868 ; of Governor Hennessey, of Barbadoes, in 1876 ; and of Governor Bartle Frere, of the Cape of Good Hope, in 1879.

British
practice.

15. In the absence of definite instructions, or positive law, it is the duty of a constitutional governor to be guided upon all questions that may arise, or matters that may be submitted to him in his official capacity, by the usage of the Crown in the mother country; which he should endeavour to ascertain and to imitate, so far as may be consistent with his position and responsibility as a colonial governor.

Constitutional
functions
of a
governor.

16. Finally, inasmuch as all local parliaments or provincial legislatures in the empire are, within their assigned jurisdiction, absolute and supreme, save only as respects the constitutional control of the Crown, it follows that the governor in every colony or province is, within the limits of his commission and delegation, entitled to be accredited with similar rights, privileges, and responsibilities to those which appertain to the sovereign in the parent state. Moreover, the necessary and lawful functions of a governor, who is the representative and personal embodiment of the monarchical principle in a British colony under parliamentary government, and who administers the authority of the Crown within the same, are neither diminished nor restrained by reason of the gradual emancipation of the colony from Imperial control in the regulation of its internal affairs.

Rights of
the Crown
in a
limited
monarchy.

The authority herein claimed, on behalf of a constitutional governor, is that which indefeasibly belongs to the English Crown in the political system of the mother country: not, be it observed, the authority exercised of old times by the personal government of sovereigns ruling despotically, with no one directly accountable to parliament for their actions; but that tempered form of royal supremacy, limited and defined by law, and by those maxims of the constitution which owe their origin to the (so-called) revolution of 1688. For that revolution was no uprising of a democracy bent on destroying existing institutions: it was, on the contrary, a

legal settlement by parliament of the relative powers in the state; a settlement which guaranteed to the nation the inestimable advantages of a constitutional monarchy, combined with the freedom, elasticity, and responsibility which appertain to a ministerial executive ruling under parliamentary government.

In conferring 'responsible government' upon her colonies, it was the design of Great Britain to convey to them as far as possible a counterpart of her own institutions. By this system, it was intended that the vital elements of stability, impartiality, and an enlightened supervision over all public affairs should be secured, as in the mother country, by the well-ordered supremacy of a constitutional governor, responsible only to the Crown; whilst the freedom and intelligence of the people should be duly represented in the powers entrusted to an administration co-operating with the Crown in all acts of government, but likewise responsible to parliament for the exercise of their authority.

And under
parlia-
mentary
govern-
ment.

The administration or cabinet, as has been justly remarked by Mr. Gladstone, 'stands between the sovereign and the parliament, and is bound to be loyal to both.'^y It may not separate itself from the Crown lest it should degenerate into a ministerial oligarchy, swallowing up those rights of the monarchy in the body-politic which are the eminent safeguards of political liberty and of national honour. But it should be equally mindful of the loyalty and deference due to the Crown as of the responsibility owing to parliament. It is in the just recognition of both responsibilities that ministerial authority under parliamentary government is freed from the encroachment and contamination of corrupt influences, and made conducive to the prosperity and progress of the commonwealth.

Responsi-
bility of
the
cabinet

^y Gleanings in Past Years, v. 1, Escott's England, its People and p. 242, quoted, with comments, in Polity, v. 2, p. 113.

Forbear-
ance and
modera-
tion
always
essential.

Lord
Russell's
despatch.

In conclusion, let me recall the seasonable words of caution contained in Lord John Russell's despatch to the governor-general of Canada, of Oct. 14, 1839, a despatch which has been termed 'the charter of responsible government,' as it was the first official communication to introduce that system into a British colony :—' Every political constitution in which different bodies share the supreme power is only enabled to exist by the forbearance of those among whom this power is distributed. In this respect, the example of England may well be imitated. The sovereign using the prerogative of the Crown to the utmost extent, and the house of commons exerting its power of the purse to carry all its resolutions into immediate effect, would produce confusion in the country in less than a twelve-month. So in a colony, the governor thwarting every legitimate proposition of the assembly, and the assembly continually recurring to its power of refusing supplies, can but disturb all political relations, embarrass trade, and retard the prosperity of the people. Each must exercise a wise moderation. The governor must only oppose the wishes of the assembly where the honour of the Crown or the interests of the empire are deeply concerned; and the assembly must be ready to modify some of its measures for the sake of harmony and from a reverent attachment to the authority of Great Britain.'²

These counsels of moderation, though immediately addressed to a popular assembly about to assume enlarged powers under a new constitution, are equally applicable to all parties and public men who are invited to assist in the working of a machine so delicate, so complex, and so carefully balanced, as parliamentary government in the colonies.

² Canada Assem. Jour. 1841, Colonisation, ed. 1861, p. 658; Gladstone's Gleanings, v. 1, p. 245. App. B. B. And see Merivale on

CHAPTER XIX.

COLONIAL JUDGES.

So long as judges of the supreme courts of law in the British colonies were appointed directly by the Crown, or under the authority of Imperial statutes, it was customary for them to receive their appointments during pleasure. Colonial judges.

The reasons for the continuance of this tenure in the colonies, after Imperial legislation for the independence of the judges in Great Britain, may be gathered from a pamphlet published by C. Colden, Esq., in 1767, in vindication of his conduct as lieut.-governor of the province of New York.^a

Thus, by the act 4 Geo. IV. c. 96, which was re-enacted by the 9 Geo. IV. c. 83, the judges of the supreme courts in New South Wales and Van Diemen's Land were removable at the will of the Crown. But these statutes were repealed by Imperial enactments, which provided new constitutions for the Australian colonies—5 & 6 Vic. c. 76; 18 & 19 Vic. cc. 54 and 55. And by the act 6 & 7 Will. IV. c. 17, sec. 5, the judges of supreme courts of judicature in the West Indies were appointed to hold office during the pleasure of the Crown. But this act was constructively repealed by the act 28 & 29 Vic. c. 63, sec. 5, which empowered all colonial legislatures to establish courts of Their tenure of office.

^a N. York Hist. Soc. Col. for 1877, p. 433.

Colonial
judges.

judicature and to provide for the constitution of the same; and it was formally repealed by the statute law revision act of 1874. A similar tenure, however, still prevails in respect to judges in the East Indies and in Crown colonies, and generally in all colonies not possessing responsible government.^b

Nevertheless, the great constitutional principle, embodied in the act of settlement, that judicial office should be holden upon a permanent tenure, has been practically extended to all colonial judges, so far at least as to entitle them to claim protection against arbitrary or unjustifiable deprivation of office, and to forbid their removal for any cause of complaint except after a fair and impartial investigation on the part of the Crown.^c

How re-
movable,

In 1782 an Imperial statute was passed which contains the following provisions:—That if any person holding an office granted or grantable by patent from the Crown, shall be wilfully absent from the colony wherein the same ought to be exercised, without a reasonable cause to be allowed by the governor and council of the colony, ‘or shall neglect the duty of such office, or otherwise misbehave therein, it shall and may be lawful to and for such governor and council to amove such person’ from the said office: but any person who shall think himself aggrieved by such a decision may appeal to his Majesty in council.^d

This law is still in force,^e and although it does not

^b Papers respecting colonial judges, Com. Pap. 1870, v. 49, p. 435 (also given in 12 Moore, *Indian App. cases*, Appx.); Act 24 & 25 Vic. c. 104.

^c Law Mag. N. S. v. 20, pp. 199–205; Rep. of Com. of Society for Promoting Amendment of the Law in 1847 on Colonial Judgeships.

^d Act 22 Geo. III. c. 75, secs. 2, 3. This act was confirmed and

amended by the act 54 Geo. III. c. 61, which regulates the method of procedure by patent officers in any colony who may desire to obtain temporary leave of absence; and declares that any public officer who shall not comply with such provisions shall be deemed to have vacated his office.

^e Hans. Deb. v. 187, p. 1495. The first section of this act, which re-

professedly refer to colonial judges, it has been repeatedly decided by the judicial committee of the privy council to extend to such functionaries. Adverting to this statute, in 1858, in the case of *Robertson v. the Governor-General of New South Wales*, the judicial committee determined that it 'applies only to offices held by patent, and to offices held for life or for a certain term,' and that an office held merely *durante bene placito* could not be considered as coming within the terms of the act.^f

Colonial judges.

From these decisions two conclusions may be drawn ; firstly, that no colonial judges can be regarded as holding their offices 'merely' at the pleasure of the Crown ; and, secondly, that be the nature of their tenure what it may, the statute of the 22 Geo. III. c. 75 confers upon the Crown a power of amotion similar to that which corporations possess over their officers, or to the proceedings in England before the court of Queen's bench, or the lord chancellor, for the removal of judges of the inferior courts for misconduct in office. Under this statute all colonial judges appointed *by patent* under the royal sign manual (which is the usual, if not universal, mode of appointment) are removable at the discretion of the Crown, to be exercised by the governor and council of the particular colony, for any cause whatsoever that may be deemed sufficient to disqualify for the proper discharge of judicial functions, subject, however, to an appeal to the Queen in council.^g But

lates to patent officers fulfilling the duties of their offices in person, was repealed by the statute law revision act, 1871.

^f 11 Moore, P.C. p. 295.

^g Memo. by Sir F. Rogers, Com. Pap. 1870, v. 49, p. 440. For precedents of proceedings under this statute, for removal of a judge, see case of Judge Montagu, of Van

Diemen's Land, in 1848, Com. Pap. 1847-48, v. 43, p. 577 ; of Ch. Justice Pedder, of Van Diemen's Land, in 1848, which resulted in his unanimous acquittal, *ib.* pp. 624-646 ; of Judge Boothby, of S. Australia, in 1867, S. Australia Parl. Pap. 1867, v. 2, Nos. 22, 23. And see Up. Can. Q.B. Rep. v. 46, p. 483.

Colonial
judges.

before any steps are taken to remove a judge from his office by virtue of this act, he must be allowed an opportunity of being heard in his own defence.^b

In Canada, by the British North America act (sec. 96), the judges are appointed by 'the governor-general, and by sec. 99 are 'removable by the governor-general, on address of the senate and house of commons.'

Judge
Willis.

In 1846 Lord-Chancellor Lyndhurst, in the judicial committee of the privy council, expressed a doubt whether a colonial governor was at liberty to remove a judge under the powers of his commission, but declared that it could be done under the statute 22 Geo. III. He added that the first case of amotion under this statute was that of a puisne judge, J. W. Willis, who was removed from the bench in Upper Canada by the governor and council in the year 1829, in consequence of his refusing to sit in the court in the absence of the chief justice, he being of opinion that the court was incompetent to sit unless all the judges were present. This order of amotion being appealed from was confirmed by the privy council.ⁱ But the intention of the law obviously requires that there should be a full and fair investigation before removal, as will appear from the following case, which, strange to say, arose out of the removal of the same gentleman from a judicial office in New South Wales.

Upon an appeal against an order of amotion of J. W. Willis, Esq., from the office of judge of the supreme court of New South Wales, made by Sir George Gipps, the governor and executive council of that colony, the judicial committee of the privy council decided, on July 8, 1846, after hearing counsel on both sides, that the governor in council had power in law to amove Mr. Willis from his office of judge, under the authority of the 22 Geo. III. ; that upon the facts appearing before the governor in council, and established before their lordships, there were sufficient grounds for such removal, but the governor and council ought to have given Mr. Willis some opportunity of being previously heard against the amotion, and that for their neglect of this the order of removal should be reversed.^j The judge, however, did not return to Australia, but remained in England, where he died on September 10, 1877.

Again, in 1849, in the case of Algernon Montagu, Esq., late a

^b Lord Chanc. Westbury; Hans. Deb. v. 164, p. 1063.

ⁱ 5 Moore, P.C. p. 388. Lord Lyndhurst's memory was at fault as to result of this appeal to the P.C.,

as appears on referring to the parl. debates, in Hans. Deb. N.S. v. 24, p. 551.

^j 5 Moore, P.C. p. 392.

puisne judge of the supreme court of Van Diemen's Land, against Sir William Denison (the lieutenant-governor) and executive council of that colony, the judicial committee decided that the governor and council of a colony have power under the statute 22 Geo. III. c. 75 to remove a judge from his office for misbehaviour. And that where a judge availed himself of his judicial office, through an incident connected with the constitution of the court over which he presided, to obstruct his creditor from recovering a debt due from him, and upon investigation was found to be involved to a large extent in bill transactions and pecuniary embarrassment, there was sufficient ground to justify the governor and council in removing him from office. It was also held that, although there had been some irregularity in pronouncing an order for amotion, when the judge had been only called upon to show cause against an order of *suspension*, yet that as the facts justified the order of amotion, and the judge had sustained no prejudice by such irregularity, the order of amotion ought not to be reversed.^k Subsequently, in 1857, the colonial legislature of Tasmania (formerly known as Van Diemen's Land) passed an act to declare that it should not be lawful for the governor, either with or without the advice of the executive council, to suspend or remove any judge of the supreme court, unless upon the address of both houses of the parliament of Tasmania (Act 20 Vic. No. 7). But from the decisions of the privy council in relation to judges in the colonies of Queensland and Victoria, under similar circumstances, it is to be inferred that this colonial act does not override the authority of the Imperial statute of 22 Geo. III. so far as amotion is concerned, although the right to *suspend* a judge in Tasmania can no longer be exercised.¹ In fact, to this extent the Tasmanian statute must be regarded as absolutely null and void, being 'repugnant' to the Imperial statute, and not authorised or confirmed by Imperial legislation.

Judge
Montagu.

But it is not only upon an appeal from the decision of a colonial governor and council for the removal of a judge under the statute 22 Geo. III. that the privy council has jurisdiction in such matters of complaint. It is competent for the Crown, acting through a secretary of state, and under the provisions of the act 3 & 4 Will. IV. c. 41, sec. 4, to refer to the consideration of

Original
jurisdiction
of
privy
council
over
judges.

^k 6 Moore, P.C. p. 489. For the governor's own view of these transactions, see Denison's Viceregal Life,

v. 1, pp. 73, 134; and Hans. Deb. v. 206, p. 1929.

¹ See *post*, pp. 835, 841.

the judicial committee a memorial from a legislative body, in any of the colonies, complaining of the judicial conduct of a judge therein.^m

Chief Justice Sanderson.

Thus, in 1847, on a memorial being presented to the Queen in council by the house of assembly of the island of Grenada, complaining generally of the conduct of John Sanderson, Esq., in his office of chief justice of that island, and enumerating various illegal and oppressive acts which he had committed during the fourteen years of his occupancy of the bench, her Majesty referred the memorial to the judicial committee. The chief justice also presented a memorial to the Queen, in which he complained of the reopening of bygone matters, which had been disposed of by competent authority, and protesting against the application, in the first instance to the privy council, whilst there was a legitimate mode of proceeding by impeachment before the council in Grenada, where both parties could be conveniently heard ; he prayed that the assembly's complaint against him might be referred to that tribunal. But her Majesty referred the judge's memorial to the judicial committee. After hearing counsel on both sides, the committee decided that during the fourteen years he had held office, the chief justice appears to have committed several intemperate and some illegal acts ; but that these acts were performed many years before the complaint was made, with only one exception, that of fining two magistrates for taking depositions in the third instead of the first person, the which, though erroneous and improper, was done in the execution of what the chief justice thought to be his duty. Wherefore, the committee did not think that he ought to be removed for misconduct.ⁿ

Chief Justice Beaumont.

In July 1868, Chief Justice Beaumont, of British Guiana, was removed from the bench, upon a memorial to the Crown from the local court of policy. This memorial charged the chief justice with improperly and intemperately holding up the executive government to contempt ; vexatiously taking occasion to embarrass the colonial administration ; imposing harsh and vindictive punishments ; using offensive, intemperate, and calumnious language ; illegally exercising arbitrary power ; and improperly interfering with the judicial records. The memorial was referred to the judicial committee of the privy council, and at their recommendation an order in council was issued for the removal of the chief justice from office.^o

^m See Sir F. Roger's Memo. on the removal of colonial judges, Com. Pap. 1870, v. 49, p. 440, and in 6 Moore, P.C. N.S. App. pp. 9-20.
ⁿ 6 Moore, P.C. pp. 38-42.
^o Law Mag. N.S. v. 25, p. 358.

It is likewise competent to either house of the Imperial parliament to entertain questions in relation to the appointment or conduct of colonial judges.^p Upon several occasions, a direct appeal has been made to the Imperial parliament by, or on behalf of, judges who had been removed from office by the local authorities in various colonies or dependencies of the realm.

Jurisdiction of parliament.

In 1863, a case of this description occurred in reference to certain judges in the Ionian Islands, which were then under the protection of the British Crown. Two of the judges of the supreme court in those islands had been removed by the senate, with the approbation of the lord high commissioner, under a clause of the constitution which made judicial offices terminable at the end of every five years. Taking advantage of the fact that this provision had not been invariably enforced, the judges in question claimed that they ought to be considered as practically irremovable, and they appealed to the secretary of state for the colonies to be reinstated in office. But after a careful review of the circumstances, the colonial secretary ratified and confirmed the removal of these functionaries.^q The matter was then brought before parliament, and debates arose in both houses upon motions for the production of papers, and subsequently in the house of lords for further papers upon the case. The latter motion was resisted by ministers, on the ground that it was a most dangerous precedent to authorise an appeal to parliament from acts of responsible ministers in the execution of the law, &c. Nevertheless, after much debate, the motion was agreed to, and the papers produced. But no action followed in either house.^r In the course of the debate an able despatch was quoted that had been addressed by the colonial secretary (Lord Glenelg) to the lord high commissioner (Sir Howard Douglas) in 1838, pointing out the incompatibility of an independent tenure of the judicial office with institutions so unlike those of Great Britain; and showing that the principle of irremovability, as it is established in this country, and in other free states, is qualified and protected from abuse by other principles of at least equal importance. 'Such especially are :—1st. The right of the representatives of the people to address the Crown for the removal of any judge for imputed misconduct ; 2nd, the right of the public at large freely to discuss the

Ionian judges.

^p Case of Mr. Huggins, asst.-judge in Sierra Leone, Hans. Deb. v. 198 p. 1214.

^q Com. Pap. 1863, v. 38, p. 141.

^r See Todd's Parl. Govt. in Eng. new ed. v. 1, p. 676.

judicial administration ; and 3rd, the right of a supreme tribunal, exempt from all reasonable suspicion of prejudice, to receive and to decide upon impeachment of the judges.*

Ceylon
judge.

In 1843, Mr. Langslow, a district judge in Ceylon, was suspended by the local government of Ceylon, and afterwards dismissed by the colonial secretary (Lord Stanley), for personal misconduct, not affecting his judicial character. On petition from Mr. Langslow, an address to the Queen was moved in the house of commons, on his behalf, for a consideration of his case, and that such relief might be granted to him as might seem fit. But after debate, wherein the justice of the sentence against Mr. Langslow was substantiated, the motion was withdrawn.[†]

In 1866, the attention of the house of lords was directed (on a motion for papers) to the case of Mr. Manockjee Cursetjee, who had resigned his office of judge in the small causes court at Bombay, owing to the publication, by the government, in the newspapers, of a letter censuring him for his conduct upon the bench. After explanations from the secretary for India, the motion was withdrawn.[‡]

Remov-
able on a
parlia-
mentary
address.

Since the introduction into the constitution of various British colonies of the principle of 'responsible government,' under which their political system has been assimilated as far as possible to that of the mother country, a provision similar to that contained in the act of settlement, authorising the judges of the superior courts of law and equity to be appointed during 'good behaviour,' subject to removal upon an address from both houses of parliament, has been established by legislative enactment in the particular colonies.

The constitutional acts of the several Australian colonies, for example, contain clauses that the judges of the superior courts therein shall be appointed by the Crown during 'good behaviour ;' but, nevertheless, it shall be lawful for *her Majesty* to remove any such judge upon the address of both houses of the colonial parliament.[§] In Canada, up to the time of confedera-

* Hans. Deb. v. 170, p. 284.

† *Ib.* v. 94, pp. 278-305.

‡ *Ib.* v. 183, pp. 1290-1308.

§ South Australia local act, see Imp. act, 18 & 19 Vic. c. 54,

1855-56, No. 2, secs. 30, 31, passed under authority of Imp. statute 13 & 14 Vic. c. 59. New South Wales :

tion, the law was substantially the same, except that 'the governor' was empowered to remove a judge upon the address of both houses of the Canadian parliament [and in case any judge so removed considered himself aggrieved thereby, he might, within six months, appeal to her Majesty in her privy council, and his motion was not final until determined by that authority].^w

Judges removable on address.

This proviso is not in the British North America act. It is therefore argued that as the appointment of a judge begins with 'the governor' (not with the sovereign), it also ends with the governor; and that a removal by this functionary cannot be appealed from to the Crown in council.

The effect of this distinction will be hereafter explained.

Notwithstanding the facilities afforded for the removal of a judge for misconduct, under the constitutional acts, the Imperial statute 22 Geo. III. may still be invoked by the governor and council of any British colony, for the removal of a judge for any reasonable cause.

Also by the governor and council.

Colonial legislative assemblies cannot be deprived of their undoubted constitutional right to address the Crown for the removal of a judge, but the exercise of this right is altogether independent of the course which the governor of the colony may think fit to pursue. The experience, both of the colonial office and of the privy council, is, however, strongly in favour of proceedings by the governor, subject to a review by one or other of those departments of state; and they have invariably found that in the cases in which proceedings

secs. 38, 39. Victoria: see Imp. act, 18 & 19 Vic. c. 55, sec. 38.

^w Upper Canada Consol. Stats. c. 10, secs. 11, 12; Lower Canada Consol. Stats. c. 81, sec. 1. By the Imp. act 30 Vic. c. 3, sec. 99, it is provided that 'the judges of

the superior courts' throughout the whole dominion of Canada 'shall hold office during good behaviour, but shall be removable by the governor-general on address of the senate and house of commons.'

Removal
of judges.

have originated with the local assemblies, the delay, uncertainty, and expense have been greatly augmented.^x

But in a colony where procedure by parliamentary address against an offending judge has been established, recourse to the statute of George III. should only be had upon complaint of 'legal and official misbehaviour.'^y

Under
certain
circum-
stances.

The law officers of the Crown in 1862 advised the secretary of state for the colonies, in reference to a case which had occurred in Queensland, Australia, as follows :—Although the judges' commissions in Queensland continue in force during 'good behaviour,' subject to a power in the Crown to remove a judge upon the address of both houses of the legislature, 'we think that in this colony the governor and council have power to remove any judge who (in the words of the act 22 Geo. III. c. 75) shall be wilfully absent from the colony without a reasonable cause to be allowed by the governor and council, or shall neglect the duty of his office, or otherwise misbehave therein. In so advising, it is hardly necessary for us to add that what the statute contemplates is a case of legal and official misbehaviour and breach of duty ; not any mere error of judgment or wrongheadedness, consistent with the *bonâ fide* discharge of official duty. And we should think it extremely inadvisable that this power should be exercised at all, except in some very clear and urgent case of unquestionable delinquency : the power given to the Crown, upon the addresses of the legislature, being adequate, and more appropriate, for all other exigencies which may arise. . . . We do not think that any action would lie against the governor for any act *bonâ fide* done by him under the powers of the statute aforesaid.'^z

We may, therefore, infer that where the remedy by parliamentary address is open, a judge should only be proceeded against under the statute 22 Geo. III., in a

^x Papers respecting removal of judges, p. 8 ; Com. Pap. 1870, v. 49.

^y See correspondence between chief justice and governor of N. S. Wales, in 1875, which was brought under notice of Earl Carnarvon (colonial secretary) by the governor, which elicited an expression of regret on the part of the colonial secre-

tary, while the independent position of the chief justice precluded further proceedings against him. N. S. Wales Votes and Proc. 1875-76, v. 2, p. 79.

^z Quoted in Votes and Proc. Leg. Assem. Victoria, Sec. Sess. 1866, v. 1, C. No. 8. See also Forsyth, Const. Law, pp. 70, 74.

case analogous to that which, in England, would warrant the issue of a writ of *scire facias* to repeal the patent of a judge for misdemeanour in office.^a If so, the institution of proceedings by a governor and council under the statute, against a delinquent judge, may be looked upon as a substitute for the more formal and less available method of applying for the repeal of a patent granted during 'good behaviour,' upon an alleged breach of the condition thereof.

Removal
of judges.

There are certain technical difficulties in the way of a recourse to the prerogative judicial writ of *scire facias* in any colony of the British Crown, that, without express legislation on the subject, would render it a hazardous, if not an illegal, proceeding, on the part of the executive government, to make use of this writ for any purpose whatsoever.^b

The question as to the applicability of this statute to colonies wherein the judges hold office during 'good behaviour' again arose in 1864, upon a controversy between the judges of the supreme court in Victoria and the executive government of that colony upon this very point. The case was ultimately submitted to the decision of the Imperial authorities, whose verdict confirmed the opinion above expressed, that the Imperial act 22 Geo. III. c. 75, empowering the governor and council of a colony to remove a judge for certain specified offences, is neither repealed nor superseded by the introduction into the colonial system of the principle of irremovability implied in the tenure of 'good behaviour' for judicial appointments.

Another question, as to the right of a governor and council to *suspend*, in lieu of removing, a judge under

^a See Todd's Parl. Govt. in Eng. new ed. v. 2, p. 857.

^b See decision of the privy council in case of *The Queen v. Hughes, Moore, P.C. Cases, N.S. v. 3*, pp. 447-456. An act to facilitate

the issue of such writs was passed in New Zealand in 1867. Local acts 31 Vic. No. 66, sec. 9. And the writ is issuable by the courts in all the provinces of the dominion, by the Canada act, 32 & 33 Vic. c. 11, sec. 29.

Right of
suspension.

certain circumstances, was also disposed of upon this occasion; as will appear by the following narrative of the case.

Case of
Judge
Barry.

On January 4, 1864, Sir Redmond Barry, one of the judges of the supreme court in Victoria, Australia, desiring a short vacation, notified the governor, Sir C. H. Darling, of his intended absence, but without formally asking leave. His excellency referred the matter to the attorney-general, to know whether this was legally correct. The attorney-general reported that judges had no right to act thus; that leave should not be 'taken' but 'allowed' by the governor and council, pursuant to the colonial act 15 Vic. No. 10, sec. 5, which provides 'that it shall be lawful for the lieutenant-governor, with the advice of the executive council, to suspend from his office until the pleasure of her Majesty be known, any judge of the supreme court who shall be wilfully absent from the colony without a reasonable cause to be allowed by the said lieutenant-governor and executive council.' This opinion was afterwards communicated to Judge Barry by the attorney-general, together with a minute of council 'allowing' his intended absence.

Judge Barry then wrote to the governor that he did not consider it necessary to obtain leave of absence before leaving the colony, since the passing of the constitution act^c by which the position of the judges of the supreme court had been altered. Under that act they are appointed during 'good behaviour,' and 'are removable only upon the address of both houses of the legislature.' He therefore declined to be bound by the attorney-general's opinion, and (in a subsequent letter) denied the right of the executive council to call in question his judicial conduct, alleging that 'that conduct can be enquired into in the way appointed by the constitution and in no other manner.' These letters were referred by the governor to the consideration of the cabinet.

Direct
communi-
cation
with the
governor.

At this stage of the proceedings a sharp correspondence took place between Judge Barry, the attorney-general, and the governor, as to the right of the judges to communicate with the governor direct, notwithstanding 'the practice since the coming into force of the constitution act for all judicial and other officers in the public service of Victoria to communicate upon all questions affecting their official rights or responsibilities with the minister of the Crown, who is charged with the duty of advising the governor in each particular case.' Ultimately Judge Barry was informed by the governor and council that the attorney-general was the responsible minister for

^c Imp. act 18 & 19 Vic. c. 55, schedule 1, sec. 38

the proper conduct of the legal business of government, the head of the department to which the supreme court is attached, and the proper medium of communication between the executive government and the judges of that court, and that all official communications from the judges respecting their rights, privileges, or duties, intended for the consideration of his excellency or the government, must in future be addressed to that functionary. On September 29, Sir R. Barry, in the name and on the behalf of the whole judicial bench, again wrote to the governor requesting him to submit this question for the consideration of the secretary of state for the colonies, 'by whose determination they are willing to abide,' viz.—'whether the judges are entitled to communicate directly, in person or by letter, with the governor of Victoria, on matters connected with their personal rights and privileges.' On April 19, 1865, the colonial secretary (Mr. Cardwell) replied to the effect that the judges, in common with all other inhabitants of the community, possessed the right of addressing the Queen's representative on matters affecting their personal rights, but he declined to give directions as to the mode of conducting their official correspondence, upon matters which concerned their official rights and privileges, leaving it to the governor, after consulting his advisers, to determine the manner in which such communications should pass between the executive and judicial authorities of Victoria. 'But whatever be the mode of correspondence adopted, the arrangements ought to be such that the judges may feel secure that any communication they might make would reach [the governor's] hand, and would receive from the representative of the Crown the attention to which it was entitled.' In transmitting a copy of this despatch to the judges, the governor intimated that the rule previously communicated to them, as to the mode of communicating with the government in regard to official matters, must be adhered to, but that all such communications would receive from him the attention to which they were entitled.^d

Case of
Judge
Barry.

Upon the merits of the main question at issue between the judges and the executive government the attorney-general of Victoria, in a letter to Governor Darling of August 22, 1864, asserted his conviction that the judges' claims were founded upon a construction of the 38th section of the constitution act, and of the act of settlement, and the act 1 Geo. III., which was 'clearly erroneous,' and 'has not been sanctioned by a single English constitutional or legal authority.' The true doctrine on the subject, as held by the minister

^d Votes and Proc. Leg. Assem. Victoria, 1864-65, B. No. 34, C. No. 2.

Removal
of a
judge.

of justice and attorney-general, was communicated to his excellency by these functionaries in an elaborate opinion.

This opinion first enquires whether the act 15 Vic. No. 10, sec. 5, authorising the governor and council to suspend, until the Queen's pleasure be known, a judge of the supreme court of Victoria who wilfully absents himself, without leave, is still in force, and it contends that, inasmuch as it has not been expressly repealed, and is not inconsistent with the new tenure during 'good behaviour' of the judicial office under the constitution act, it remains in force ; together with the Imperial acts 22 Geo. III. c. 75, and 54 Geo. III. c. 61, which, jointly, confer on the governor and council the power of suspending as well as of removing a judge.

In proof of these statements the opinion proceeds to enquire what 'misbehaviour' would constitute a legal breach of the conditions of this tenure in language already quoted ; and having ascertained this, it sets forth that the office of judge is also determinable upon an address to the Crown by both houses of the local parliament ; that upon the presentation of such an address the estate in his office of the judge in regard to whom the address is presented may be defeated ; that the Crown is not bound to act upon such an address, but if it think fit so to do is thereby empowered to remove the judge without any further enquiry, or without any other 'cause assigned than the request of the two houses.'

Assuming, therefore, that a judge is removable either for 'misbehaviour' in office, sufficient to constitute a legal breach of the condition of his patent, or at the pleasure of parliament, expressed by an address from both houses, and for no other cause whatsoever, the opinion next examines whether the power of suspension, under the act 15 Vic. No. 10, is really consistent with the tenure of 'good behaviour.' At common law the grantor of an office has the power to suspend the grantee from his duties, though not to affect his salary or emoluments. It was held by Lord Nottingham, in *Slingsby's case*,^e that this power of suspension may be exercised when there is in the office an estate, not merely for life, but even of inheritance. But it can only be exercised by a power similar to that by which the office was conferred. And as judges are appointed by the Crown under letters patent, they could only be suspended or deprived by a proceeding at law for an avoidance of the patent, or by some other legal action on the part of the Crown.^f

Colonial judges, however, have been placed by Imperial statutes in a different position. The 22 Geo. III. c. 75, as confirmed by the 54 Geo. III. c. 61, supersedes the necessity for a *scire facias*, and

^e 3 Swanston Rep. p. 178. ^f See Todd, Parl. Govt. in Eng. v. 2, p. 858.

gives the governor and council a power of amotion similar to that which corporations possess over their officers.^g Wherefore, it is argued in this opinion, since the greater includes the less, this power of amotion will bring with it the power of suspension.

Removal
of a
judge.

The opinion concludes by asserting :—1. That the altered tenure of the judges under the constitution act is not inconsistent with the act 15 Vic. No. 10, sec. 5, empowering the governor and council to suspend a judge who absents himself without leave. 2. That the said section is still in force. 3, 4, and 5. That the Imperial acts 22 Geo. and 54 Geo. III., so far as they relate to judges of the supreme court, are also in force in Victoria, and empower the governor in council to suspend as well as to remove the judges.

Being agreed to by the council, this opinion was transmitted to the judges, with an intimation that they must hereafter comply with the provisions of the act 15 Vic. No. 10, sec. 5. Whereupon Sir R. Barry, on behalf of the bench, protested against this declaration, and deeming it unbecoming that the judges should discuss a question of law with a body having executive and political functions, expressed a desire that the governor would endeavour 'to obtain the judgment of the only tribunal competent to determine the question—namely, the judicial committee of the privy council.'^h

On September 30, 1865, the chief justice transmitted to the attorney-general (to be forwarded by the governor to the colonial secretary) a petition of the judges of the supreme court to the Queen, praying that the question—whether, as regards said judges, the Imperial act 22 Geo. III., and the colonial act 15 Vic. *afore-said*, are still in force—might be referred to the judicial committee of the privy council for hearing and consideration.

This petition claimed that the said statutes were—by the constitution act, which declared that the judges should hold office during good behaviour, and be removable upon a parliamentary address—'absolutely repealed—if not in express terms, as being laws con-

^g See *ante*, p. 829.

^h Meanwhile, the ministry introduced into and passed through the assembly of Victoria a bill to consolidate the laws relative to the supreme court. This bill included the particular section 5 of the act 15 Vic. No. 10 which the judges contended had been repealed by the constitution act, but which the government declared to be still in force. This led to an angry correspondence between the chief jus-

tice and the attorney-general, and finally to a petition from the judges to the legislative council, before whom the bill was pending, protesting against the measure as an attempt to legalise an arbitrary assumption of power. On June 22, 1865, the bill was rejected by the legislative council. See *Votes, &c., Leg. Assem. Victoria, 1864-65, C. No. 2; Votes, &c. Leg. Coun. 1864-65, E. No. 4.*

Removal
of a
judge.

trary to that statute—at least by necessary intendment, as being inconsistent therewith and repugnant thereto.’ And it alleged that the executive, acting on an opinion from their legal advisers, asserted the contrary, and had announced their intention of enforcing them against the petitioners, to the manifest detriment of their judicial independence, and the proper administration of justice in the colony.

The petition, with explanatory documents annexed, was referred by the governor to the attorney-general, to be reported upon before transmission to the colonial secretary.

On October 23, 1865, the report of the law advisers of the Crown on this petition was forwarded to the governor. It recapitulated the arguments contained in their opinion above mentioned. It also showed that in the course of the discussion the judges had altered their ground, for whereas they had ‘at first contended that they were responsible to the governor, moved by the two houses of parliament, and to no other body, and that they were removable only upon an address of both houses,’ they had afterwards admitted ‘that they were removable not only upon an address, but also upon proof of misbehaviour in office, before a court of competent jurisdiction.’ If so, it was contended there was no such inconsistency or repugnancy between the several acts alleged to be in force as the judges had asserted. Furthermore, it was urged that ‘the judicial independence of the judges of the supreme court is not in any degree affected by this question,’ for that such independence is as highly prized by the people of Victoria as it is in England. Nevertheless, if it were proper to make mention of political considerations to influence the opinions of the judicial committee on a purely legal question, it could be ‘demonstrated by various proceedings of the judges of the supreme court in this, as well as in the neighbouring Australian colonies,’ that it is expedient ‘to retain a certain degree of authority over judges of all ranks in matters not connected with the exercise of judicial functions.’

On October 24 the governor transmitted to the colonial secretary the judges’ petition, the attorney-general’s report thereon, and the documents annexed thereunto. While refraining from expressing any opinion upon a purely legal question, his excellency intimated his desire that it should be settled by competent authority.

On January 25, 1866, the secretary of state for the colonies (Mr. Cardwell), in a despatch to Governor Darling, declared that he considered it ‘by no means undesirable that important constitutional questions should be habitually referred by colonial governments, or legislatures, for the judgment of the judicial committee;’ but that in the present instance the lord president of the council, after con-

sulting precedents, had decided that on grounds both of previous practice and of principle, it was inexpedient to comply with the judges' application. 'The question raised by the judges is as yet entirely of an abstract and theoretical character,' 'and it appears to the lord president to be highly inconvenient to call upon a court of appeal—such as the judicial committee of the privy council is, in relation to the colonies—to decide abstract questions of law, so that whenever a case actually arises for the application of the law it should be pre-determined.'

Removal
of a
judge.

But prior to the refusal of the president of the council to entertain the judges' petition, the colonial secretary had referred the papers to the law officers of the Crown (Sir Roundell Palmer and Sir R. P. Collier), by whom, on January 10, 1866, he was advised 'that notwithstanding the passing of the constitution act (18 & 19 Vic. c. 55), the governor and council can still "amove" judges under the Imperial statute 22 Geo. III. c. 75, and that the governor and council probably retain the power of suspending judges under the local act.' The colonial secretary forwarded an extract from this report, with a copy of a report to the same effect, in November, 1862, by the then law officers (Sir Wm. Atherton and Sir R. Palmer), on a similar question which had been raised in the colony of Queensland.

Power of
suspension.

The first-named opinion, after confirming that of their predecessors in the Queensland case, that the authority conferred upon the governor and council to 'amove' colonial judges, by the act 22 Geo. III., remains in force, adds :—'We also think it is the better opinion, that they can still suspend judges under the local act 15 Vic. No. 10, s. 5, the power of suspension, for the causes therein mentioned, being not inconsistent with the tenure of the office during good behaviour, especially if the office is (as we consider it to be) held subject to the power of amotion, for the like causes, given by the 22 Geo. III. c. 75.'

The opinion of the law officers of the Crown in the Queensland case enters more fully into the question before them, which was strikingly analogous to the Victoria case, except that there was no local act in Queensland to authorise the suspension of a judge. After defining the circumstances under which the power of the Crown to remove judges and others holding office during 'good behaviour' might be exercised under the Imperial act 22 Geo. III., and pointing out that on general principles, 'except so far as it may be controlled by express legislation, there is no constitutional reason why in a colony where parliamentary or responsible government is established' that power might not continue to be exercised, together with the power of removal upon a parliamentary address, the opinion

Suspension of a judge.

proceeds to consider the right of suspension. Inasmuch as there was no local act authorising the same, the Crown law officers 'do not think that the governor has any power, with or without the advice of the executive council, to *suspend* a judge. An order of suspension (as distinguished from amotion) would be, in our opinion, a mere nullity; though, in order to determine that question, an appeal to her Majesty in council, if presented, would doubtless be entertained. And we think that an action would lie against the governor if he were to attempt to enforce any such order of suspension.'

On March 20, 1866, the attorney-general of Victoria forwarded to the chief justice, for the information of the judges of the supreme court, the aforesaid despatch from the colonial secretary, with its enclosures, in reference to their petition to the Queen in council. In reply the chief justice expressed the regret entertained by the judges that her Majesty had not been advised to submit their case to the decision of the judicial committee.ⁱ

Suspension of judges.

While the English law officers of the Crown, in the preceding case, deny the right of a governor and council without express statutable authority to *suspend* a judge holding office during 'good behaviour,' a point wherein they seem to differ from the opinion of the colonial office, which has held that the powers of a governor and council to suspend, as well as to amove judges appointed 'during pleasure,' are 'considered applicable, *in the absence of any statutory provision*, to judges holding during good behaviour,'^j there can be no question that such a power may be lawfully exercised if conferred upon the governor and council by a local enactment.^k

All judges holding office 'during pleasure' are subject to removal by the governor of the colony, after taking the advice of his council, under the authority of

ⁱ For the correspondence, petitions, and other papers in this case of the Victoria Judges, from Jan. 4, 1864, to March 27, 1866, see Votes and Proc. Leg. Assem. Victoria, 1864-65, B. No. 34, C. No. 2; and Sec. Sess. 1866, v. 1, C. No. 8.

^j Memo. of Privy Coun. Practice in Removal of Colonial Judges, p. 4; Com. Pap. 1870, v. 49.

^k The provisions of the Victoria act, 15 Vic. No. 10, sec. 5, to this effect have been enacted in other colonies in Australia.

the Imperial act 22 Geo. III. And judges appointed, during pleasure, may be suspended under the authority of the Queen's commission and instructions, which authorise the governor to suspend any officer who is liable to dismissal by the Crown. This suspension becomes dismissal if confirmed by the Queen, who would in general act on the advice of the secretary of state; but in the case of a judge would most probably invoke the aid of the judicial committee of the privy council. Secretaries of state have inclined to prefer proceedings by 'a motion' under Burke's act, with appeal to the judicial committee, rather than suspension under the royal instructions, with appeal to themselves. Under certain circumstances immediate suspension is clearly advisable. But a governor who resorts to such a measure does so at his own peril, and is bound to make out a complete case in justification of it.¹ The rules which regulate the performance of this duty are prescribed by the colonial regulations, Nos. 81 to 96.

Removal
of a
judge.

A judicial officer when suspended is commonly allowed an appeal to the Queen in council, though not invariably so, as in some cases the secretary of state has himself advised the Crown to confirm or to disallow the suspension.^m

Upon the suspension, in 1853, of the Hon. H. Cloete from the office of recorder of the district court of Natal by the governor and council, under the authority of an ordinance of the Cape of Good Hope colony, for misconduct in office, the judicial committee of the privy council on appeal decided that the order of suspension was unfounded and frivolous, and directed it to be rescinded. Mr. Cloete was soon afterwards promoted to a higher judicial office.ⁿ

Upon the transfer, in 1867, of the Straits Settlements from the government of India to that of the colonial office, under the

¹ See Earls Grey and Granville of Privy Council in Removal of Judges, p. 4; Com. Pap. 1870, v. 49.
1047. ⁿ 8 Moore, P.C. 484.

^m Practice of Colonial Office and

Removal
of judges
in Straits
Settle-
ments.

authority of the act 29 & 30 Vic. c. 115, the judges therein became liable to suspension by the governor, for any cause that he might deem sufficient, by virtue of his commission from the Crown, as well as to removal from office pursuant to the act 22 Geo. III. c. 75.

For some sixty years previously, and ever since the establishment of a supreme court in the Settlements, these judges had been wholly independent of the local authorities ; and if their conduct was ever questioned, it was submitted to the secretary of state, who being free from all local or personal bias decided with impartiality. Accordingly, in 1868, the leading inhabitants of Singapore petitioned the home government that their judges might be restored to the position of independence which they held before the transfer. In reply the colonial secretary (the Duke of Buckingham) declined to comply with this petition, pointing out that the judicial tenure now introduced into the Straits Settlements generally prevailed throughout the British colonies where responsible government was not established.*

Their
removal
upon an
address.

It now remains to consider the circumstances under which the two houses of parliament in a British colony may approach the Crown with an address for the removal of a judge holding office under a parliamentary tenure, and the proceedings necessary to give validity and effect to any such address.

Case of
Judge
Boothby.

The first occasion wherein the Crown was addressed by the two houses of parliament of a British colony for the removal of a judge holding office during 'good behaviour' was in the year 1861, in the case of Mr. Justice Boothby, a puisne judge of the supreme court of South Australia. Mr. Boothby had given offence to the colonial legislature by calling in question the legality and constitutionality of certain of their proceedings, and especially of an act agreed to by both houses, and sanctioned by the governor. Whereupon the legislative council passed an address to the Queen that her Majesty would be graciously pleased to exercise the power reserved to her by the constitutional act, and remove Mr. Boothby from his judicial office. The house passed a separate address to the Queen to the same effect, adding that 'in consequence of the position assumed by Mr. Justice Boothby public confidence in his administration of the laws of this province is destroyed.' But no reasons were given, or grounds of complaint specified, by either house.

In communicating the aforesaid addresses to the colonial secre-

* Corresp. respecting colonial judges ; Com. Pap. 1870, v. 49, p. 435.

tary, the governor of South Australia (Sir R. G. MacDonnell) stated that he thought 'both branches of the legislature had pursued a dignified course in finally determining not to give any reasons for the request which they urge, as it is not to be presumed that they would move in such a matter lightly, or till after such repeated provocation as would justify them in urging on the sovereign the request' for Mr. Justice Boothby's removal. At the same time, his excellency proceeded to enumerate, for the information of the colonial secretary, various particulars in the conduct of the judge which he deemed an ample justification of the course taken by the two chambers. He also transmitted communications from the judge, in his own defence, in reply to a letter addressed to him by his excellency's command, informing him of the addresses that had been passed for his removal, specifying the several proceedings of the judge which, in his excellency's opinion, had 'apparently influenced the parliament in adopting those addresses,' and offering the judge 'six months' leave of absence on full pay' to enable him to visit England to vindicate his character and conduct before the Imperial authorities, he having declined to attend a select committee of the legislative council appointed to examine his 'recent judicial decisions and conduct.'^p

On the receipt of these addresses, the colonial secretary (the Duke of Newcastle) took the opinion of the law officers of the Crown (Sir William Atherton and Sir Roundell Palmer) on the subject. In conformity with their advice, he informed the governor that her Majesty's government considered 'that a colonial judge is not only at liberty but is bound to entertain the question whether a colonial law, material to the decision of the question before him, is or is not valid'; that Judge Boothby was right in the main, though not in every instance, when he questioned the validity of certain acts of the South Australian legislature; and that, inasmuch as this legislature, when it passed the addresses for the judge's removal, was not, strictly speaking, legally constituted—although the Imperial parliament had since remedied the defect—it had not been deemed expedient to advise the Crown to remove Judge Boothby, pursuant to the said addresses. With regard to other matters wherein the judge had given offence to the legislative chambers, so long as it was unadvisable to give effect to the addresses for his removal from the bench, her Majesty's government considered that it would be unbecoming 'to express any mere unauthoritative opinion respecting the official conduct of a judge.'

Furthermore, added the secretary, 'I hold the practical inde-

Case of
Judge
Boothby.

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Judge
Boothby.

pence of the superior courts of a colony to be, with the appointment of the governor, the right of exercising a veto upon colonial enactments, and the right of appeal to her Majesty in council, among the links which bind together the colonial empire of Great Britain. It is of vital importance not only to the colonies, but to all those who have dealings with them of whatever kind, and to the Imperial government itself, that these courts should exercise their functions in entire independence not only of the local executive, but of the popular feelings which are from time to time reflected in the legislature, or of any political party which may happen to be in the ascendant. And I consider that the principal guarantee of this independence is to be found in the assurance that a judge, once appointed, will not be misplaced without the reasonable concurrence of an authority wholly removed from all local or temporary influences. By the existing law of South Australia, I consider such an authority to be entrusted very properly to her Majesty, acting on the advice of her ministers in Great Britain, and I hold that in dismissing a judge in compliance with addresses from a local legislature, and in conformity with that law, the Queen is not performing a mere ministerial act, but adopting a grave responsibility, which her Majesty cannot be advised to incur without satisfactory evidence that the dismissal is proper.'

The colonial secretary was prepared to admit that a judge might be properly removed on a parliamentary address, if satisfactory proof were adduced 'that owing to his perversity, or habitual disregard of judicial propriety, the administration of justice might be practically obstructed by his continuance in office;' and this might be shown 'by his inflexible enforcement of opinions which were inconsistent with the beneficial performance of his duties,' and which might be regarded by competent authority as 'incorrect in point of law.' In conclusion, his grace observed, that 'while expressing no opinion respecting Mr. Boothby's conduct, I have thought it due both to him and the colony to state thus explicitly the principles by which I should be guided in dealing with any charges which might hereafter be brought against a colonial judge, on the authority of a colonial legislature.' (Signed) Newcastle, April 24, 1862. In conclusion, it may be remarked that the Crown law officers made no objection to the circumstance of there being separate addresses from the two houses, in place of one joint address. Nor did they deem it to be irregular that the addresses omitted to state any specific charges, 'provided that the Crown is by any means satisfied of the reasons on which the address is founded.'^a

^a Corresp. relative to Mr. Justice Boothby, Com. Pap. 1862, v. 37, pp. 180-184.

Notwithstanding his acquittal, in the first instance, the continuance of Judge Boothby upon the bench occasioned so much public inconvenience, owing to his persistence in a line of conduct which impaired the confidence of the community in the due administration of justice, that the government of South Australia was induced to convene the legislature for June 15, 1866, for the express purpose of dealing with his case.

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Judge
Boothby.

Shortly after the opening of the session of 1866-67, on June 22, 1866, enquiry was made of ministers in the house of assembly of South Australia, whether government had taken any other legal opinions on the removal of Judge Boothby, besides those laid before parliament. To which it was replied that Mr. Parker, 'an English barrister of considerable experience, and upwards of thirty years' standing,' had given it as his opinion, upon a case furnished to him by the attorney-general, that Judge Boothby had been 'guilty of such misbehaviour in his office as to justify his amotion.' But Mr. Parker added, 'I think enquiry, and an opportunity of answering the complaint, must precede amotion. If there be no enquiry, or an enquiry without the opportunity offered of replying to the charges, I think the amotion will be hard to be had on appeal to the privy council.' On the same day, the chief secretary moved that an address be presented to the Queen for the removal of the judge from his office, because of certain reasons (six in number) therein set forth, 'by which several means the laws of this province are rendered uncertain and of doubtful effect, the rights of property jeopardised, and the perpetration of crime encouraged. All which serious things we fear will continue amongst us so long as Mr. Boothby retains his office as a judge of the supreme court.' This motion was agreed to at the same sitting, and a committee appointed to draft the address, who reported it forthwith. The next sitting day a motion was made for the adoption of the address, which gave rise to a debate, which was adjourned until the 28th of the same month, when the address was passed.

About the same time (on June 26) a similar address was proposed in the legislative council, on which an amendment was moved for the appointment of a select committee to enquire into and report upon the charges brought by the government against Judge Boothby. On the following day the amendment was negatived, the main motion agreed to, and the address presented and ordered to be considered in committee of the whole house on the next sitting day (July 3), when it was considered, reported, and agreed to.

Ministers gave notice to Judge Boothby of their intended motion in the house of assembly, and supplied him with a copy of the reports furnished to them by the attorney-general and Crown solicitor,

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Judge
Boothby.

upon which the accusations against him were based, in order that he might be informed of the intended proceedings in parliament for his removal; but no evidence was taken at the bar of either house, neither was the judge invited to appear before either house in his own defence. The address was carried in the house of assembly without a division, and in the legislative council by a large majority. The governor, in forwarding the address to the colonial secretary, strongly urged that her Majesty should be advised to comply with their prayer. [On January 8, 1867, Governor Daly informed the legislative council, by message, that the question of the removal of Mr. Justice Boothby from office would be brought under the consideration of the judicial committee of the privy council.] Shortly afterwards Judge Boothby forwarded direct to the colonial secretary his defence against the charges preferred against him, and his protest against the irregular and unparliamentary manner in which the proceedings for his removal had been hitherto conducted. These were likewise laid before the judicial committee, and copies transmitted to the governor of South Australia.

By a despatch from the colonial secretary (Lord Carnarvon) to Governor Daly, dated October 23, 1866, copies of correspondence were transmitted which showed that her Majesty had been advised to bring the question involved in the addresses from the legislative council and house of assembly of South Australia under the consideration of the lords of the judicial committee of the privy council. Inasmuch as 'the right decision of this matter might involve numerous and disputed questions of law,' it appeared to the colonial secretary to be 'indispensable that her Majesty should be supported by the authority of their lordships in exercising the responsibility imposed on her by the colonial act.' 'Though cases of this kind have been frequently submitted to their lordships, the present is the first in which they will have been called to advise her Majesty on the removal of a judge holding [office] during good behaviour in a colony possessing what is called responsible government, and in virtue of an enactment framed in terms of the Imperial act of parliament relating to the removal of judges in this country.'^r

By a subsequent despatch from the colonial secretary, dated November 21, 1866, Governor Daly was notified that her Majesty had been pleased, by order in council of November 10, 1866, to refer the said addresses to their lordships, 'and that, in order that the matter of those addresses might be brought to a hearing at the bar of the privy council, it would be necessary that the particulars of

^r Proc. &c. Parl. S. Australia, 1867, v. 2, No. 22; App. p. xlviii.

the charges against Mr. Boothby should be framed with precision and embodied in a case.'

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Judge
Boothby.

The executive council of South Australia, however, in a minute dated December 27, 1866, protested against a reference of the addresses to the judicial committee, on the ground that the question of giving effect to them was 'not a question of law, but one of constitutional right and public policy.' They claimed that 'the addresses of the two houses of parliament of South Australia, relating to the removal of a South Australian judge, should be dealt with by her Majesty's ministers in the same manner as similar addresses by the Imperial parliament for the removal of an English judge'; which addresses, they apprehended, 'would not be referred by the home secretary to the judicial committee, or to any other legal tribunal.' They alleged, moreover, 'that there is no instance on record in which the addresses from two houses of parliament, in a colony having responsible government, have been referred to the judicial committee'; and they pointed out that the object of the South Australian government in electing to proceed against Judge Boothby by 'the higher, and, as they believed, more speedy, constitutional remedy' of an address, instead of availing themselves of the statute of 22 Geo. III. c. 75, had been defeated by the course which had been adopted by the Imperial government.

By a despatch, dated November 30, 1866, the colonial secretary forwarded to Governor Daly a letter from the privy council office stating that, 'in order that the matter of these addresses may be brought to a hearing at the bar of the privy council, it appears to the lord president that the same course of proceeding should be adopted which was followed in the case of the representatives of the island of Grenada *v.* the Hon. J. Saunderson, chief justice. For this purpose it will be necessary that the particulars of the charges brought against Mr. Justice Boothby should be framed with precision and embodied in a case. A legal agent must likewise be appointed in London to conduct the proceedings in the forms in use before the judicial committee.' Provision must also be made to secure an opportunity to Mr. Justice Boothby 'to put in his answer and to take such steps as he may be advised for his justification.'

The foregoing despatch was referred to the executive council of South Australia by the governor, and in a minute of council, dated February 25, 1867, the conclusions therein contained were assumed to indicate 'a deliberate refusal on the part of the colonial secretary, as her Majesty's constitutional adviser,' to recommend the Queen to exercise the functions conferred upon her under the South Australia constitution act—'powers which were deliberately assumed by her Majesty's government, and which a former secretary of state has

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actually exercised.' The minute reiterates the previous assertions of council as to the inapplicability of the proposed proceedings of the Imperial government to the circumstances of a colony possessing a responsible government ; warns the government of the consequences of persisting in their intended course ; and declines to advise a compliance with the suggestions of the lord president of the privy council.

Meanwhile, the colonial secretary, in a despatch to Governor Daly, dated February 26, 1867, explained why it had been deemed necessary to refer this question to the judicial committee of the privy council. Agreeing with his predecessor, the Duke of Newcastle, 'that, in dismissing a judge in compliance with addresses from a local legislature and in conformity to law, the Queen is not performing a mere ministerial act, but adopting a grave responsibility,' it follows that 'before acceding "to such a demand" her Majesty's advisers are bound to require satisfactory evidence that it is a proper dismissal.' If the case had been one of 'moral guilt,' or unequivocal delinquency, and if it 'had been sent home in a proper shape,' it might have been unnecessary to apply for any other legal advice than that which is ordinarily at the command of a minister to enable him to form a clear judgment. But owing to its complexity, and to the admixture therein of questions of conduct and of law, it necessarily required the advice of the highest legal tribunal.

Adverting to the presumed analogy between an address from the Imperial parliament for the removal of a judge and the one under consideration, the secretary proceeds as follows :—'It is probable that the charges against an English judge would have been stated with a precision which is wanting in the addresses transmitted to me from South Australia—that they would have been supported in detail by authentic evidence—that the judge would have had every opportunity for defence, that the legal questions at issue would have been debated within the walls of parliament by some of the greatest lawyers of the day—and that in cases of doubt the advice of the most eminent judges would have been obtained.' 'In this novel proceeding, the course of which her Majesty is now called upon to determine, it is incumbent upon the Crown to secure to colonial judges a protection against exaggeration and misunderstanding, from whatever quarter it may proceed, as effectual as that which their English brethren might be expected to obtain from the deliberations of such an assembly as the British parliament. And I must add, that the circumstances of the present case illustrate the necessity of such an intervention. For I do not even see that Mr. Boothby has been called on to answer the charges against him. . . . If Mr. Boothby's conduct justified, and the interest of the colony

required, his prompt removal, it would have been far better to have adopted the responsibility of removing him under the authority of the Act 22 Geo. III. c. 75. . . . I am inclined to think that, even now, your government would act most wisely by commencing proceedings under that act. But they will do well to bear in mind that, in that case, their decision will be subject to an appeal to the privy council, and that with a view to that appeal their charges must be adequate and precise, that the evidence of facts must be sufficient, and that Mr. Boothby must be fully heard in his defence.' (Signed) Carnarvon.^s

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Judge
Boothby.

These conclusions of her Majesty's government were confirmed by a despatch from secretary the Duke of Buckingham, dated May 23, 1867.^t

In the governor's speech at opening of parliament on July 5, 1867, his excellency briefly recapitulated the facts above mentioned, and proceeded to state that, 'believing it to be absolutely necessary for the well-being of this community that Judge Boothby's conduct should be enquired into, he had instituted an investigation before himself and his council, under the authority of the act 22 Geo. III. c. 75, which was still pending, and at which Mr. Boothby would have an opportunity of tendering evidence, and being heard in his defence.'^u

The enquiry commenced on June 24, 1867, and closed on July 29, the executive council having sat, in the presence of the governor, for eight days, to conduct this investigation. The judge was present at the commencement of the proceedings, and also on the second day, but afterwards thought proper to absent himself. Nevertheless, he was duly summoned to appear at every sitting, and proof of each summons being invariably adduced before the resumption of the enquiry, and empowered to call such evidence as he might think necessary for his exculpation. On the seventh and eighth days, however, Mr. Justice Boothby attended, was made acquainted with the evidence taken before the council, and allowed time to prepare his defence. After having heard and considered his reply to the charges brought against him, the council resolved that they 'find the aforesaid charges proved and established; and that, in respect of the matters and conduct referred to in each of the said charges, the said Benjamin Boothby has misbehaved himself in his said office of second judge of the supreme court; and by reason of such misbehaviour, his excellency and the council amove the said B. Boothby from his said office, and order his amotion accordingly.'

^s Proc. and Pap. S. Australia, 1867, v. 2, No. 23.

^t *Ib.* No. 41.

^u S. Australia Leg. Coun. Jour. *Ib.* v. 1, p. 1.

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Judge
Boothby.

Whereupon proclamations were issued by the governor and council, revoking the letters patent by virtue of which the judge had been appointed to office, and notifying 'all to whom these presents shall come' of their decision, under their hands, attested by the public seal of the province.^v

A governor and council, convened under the Imperial act 22 Geo. III. for enquiring into the conduct of a colonial judge, have no compulsory powers to summon witnesses, and cannot take evidence upon oath. Herein this tribunal resembles the jurisdiction exercised by the lord chancellor, under particular statutes, for the removal of county court judges, 'for inability and misbehaviour.'

Jurisdic-
tion of the
privy
council.

And here it may be observed, that while, as will appear from cases cited in this chapter, an appeal lies to the Queen in council, upon the removal of a judge in any colony by the governor thereof, whether it be in consequence of a proceeding under the act 22 Geo. III., or in compliance with a parliamentary address, there is no appeal to the privy council, or to any other tribunal, where the removal is effected by the direct authority of the Queen. Nevertheless, it has been determined that the Queen is not a passive agent in such transactions, but is bound to ascertain the propriety of a removal before authorising the same. This would probably be done by referring the questions connected with the conduct of the judge to the judicial committee of the privy council, before whom the judge should be permitted to be heard by counsel in his defence.^w

Neglect of
proper
formali-
ties in
Judge
Boothby's
case.

An examination of the proceedings in the South Australian legislature in the case of Mr. Justice Boothby will show that none of the formalities which have invariably attended the conduct of such investigations by the houses of lords and commons were observed upon this occasion. In both chambers, select committees

^v S. Australia Leg. Coun. v. 2, Council Memo. *Ib.* p. 442; Earl Grey in Hans. Deb. v. 170, p. 300.

^w Sir F. Roger's Memo. Com. *Ib.* v. 201, p. 1042.
Pap. 1870, v. 49, p. 440; Privy

were appointed to enquire into certain judicial decisions of the judge, and his honour was summoned to attend and give evidence before the same. While he appeared as a witness before the house of assembly committee, he thought proper to decline to attend upon that of the legislative council. But after the reports of these committees were drafted, no opportunity was afforded to the judge, by either house, to rebut the criminatory charges therein contained, or to appear by himself or counsel at the bar in his own defence. There was no further enquiry instituted by either house, and the addresses were severally passed without embodying the specific charges of misconduct which had induced the houses to agree to them.* These grave departures from constitutional practice can only be accounted for or excused by the want of adequate information as to the proper course of procedure in parliament against judges—a want which the present work attempts, for the first time, to supply—and by the fact that the highest constitutional authorities seem to have overlooked the cases that have actually arisen in England, of a like nature, under the Imperial statutes.

Irregularities in Judge Boothby's case.

Thus, in Lord Brougham's 'Treatise on the British Constitution' (2nd edit. 1861), it is said, in reference to the removal of judges upon a joint address of the two houses of parliament, 'there is no instance of this ever having been done' (p. 357). And the law officers of the Crown, in a legal opinion dated April 12, 1862, remark that 'no instance of the removal of an English judge by the Crown, on the address of both houses of parliament, has occurred since the passing of the 1 Geo. III. c. 23'; quite overlooking the case of Sir Jonah Barrington, not to mention the several other cases cited in this chapter, wherein the procedure upon an address was resorted to. †

It is to be regretted, moreover, that the English law officers of the Crown should have acquiesced in the omis-

* See the Proceedings of the 3 vols.
Parliament of S. Australia, 1861, † Com. Pap. 1862, v. 37, p. 183.

Irregularities in Judge Boothby's case.

sion of the particular grounds of complaint against Judge Boothby, in the addresses for his removal, 'provided that the Crown was, by any means, satisfied of the reasons on which the addresses were founded.' Such an omission was undoubtedly irregular and unparliamentary, and might serve as a precedent hereafter for a more serious departure from substantial justice. In one of the few states of the American republic wherein the British tenure of judicial office is retained, the governor refused to comply with an address of the two branches of the legislature for the removal of a judge, because no reasons for the same had been assigned in the address, while in every former application of the kind to the executive, 'full reasons' for removal had been given.* If hereafter it should unhappily be necessary for the legislative chambers in any British colony to assume the responsibility of addressing the Crown to remove an unworthy occupant of the judicial bench, it may be hoped that the proceedings will be conducted with the solemnity, impartiality, and respect for constitutional rights which ought always to attend upon the exercise of such important functions by a legislative body.

* Acts and Resolves of the State of Massachusetts, 1856, pp. 325-335. For the judicial tenure, under federal and state constitutions, see 1 Kent's Com. 12th ed. p. 295 *n.* (A); Judge Miller's (of U.S. Supreme Court) Address on this subject on Nov. 19, 1878, quoted in the Montreal Legal News, v. 1, pp. 569-573. And see Eng. L. T. June 18, 1881, p. 109.

In 1882, congress passed an act to retire Mr. Justice Hunt, of U.S. Supreme Court, upon full salary, he having for years been unfit for service, but unwilling to resign; Southern Law Rev. N.S. v. 7, p. 912.

See Story, Constitution of the United States, secs. 1600-1632, as

to the importance of maintaining the independence of the judges without encroachment. Thoughtful American writers are advocating a general return to a judiciary appointed by the executive, and holding office during good behaviour, as the only means of rescuing the nation from the disgrace entailed by the proceedings of a judiciary elected by popular vote, and for a limited period. See American Law Rev. v. 3, p. 85; v. 7, p. 180; v. 8, pp. 1, 170. Seaman, American System of Government, p. 162. New York has changed her judicial tenure from eight to fourteen years. Eaton, Civ. Serv. Reform, p. 72 *n.*

APPENDIX.

BRITISH NORTH AMERICA ACT, 1867.

30 & 31 VIC. c. 3. [IMP.]

WHEREAS the provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom :

And whereas such a union would conduce to the welfare of the provinces and promote the interests of the British empire :

And whereas on the establishment of the union by authority of parliament it is expedient, not only that the constitution of the legislative authority in the dominion be provided for, but also that the nature of the executive government therein be declared :

And whereas it is expedient that provision be made for the eventual admission into the union of other parts of British North America :

Be it therefore enacted and declared by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows :

I.—PRELIMINARY.

1. This act may be cited as the British North America Act, 1867. Short title.

2. The provisions of this act referring to her Majesty the Queen extend also to the heirs and successors of her Majesty, Applica-
tion of
provisions

referring
to the
Queen.

kings and queens of the United Kingdom of Great Britain and Ireland.

II.—UNION.

Declara-
tion of
union.

3. It shall be lawful for the Queen, by and with the advice of her Majesty's most honourable privy council, to declare by proclamation that, on and after a day therein appointed, not being more than six months after the passing of this act, the provinces of Canada, Nova Scotia, and New Brunswick shall form and be one dominion under the name of Canada; and on and after that day those three provinces shall form and be one dominion under that name accordingly.

Construc-
tion of
subse-
quent pro-
visions of
act.

4. The subsequent provisions of this act shall, unless it is otherwise expressed or implied, commence and have effect on and after the union, that is to say, on and after the day appointed for the union taking effect in the Queen's proclamation; and in the same provisions, unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under this act.

Four pro-
vinces.

5. Canada shall be divided into four provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick.

Provinces
of Ontario
and
Quebec.

6. The parts of the province of Canada (as it exists at the passing of this act) which formerly constituted respectively the provinces of Upper Canada and Lower Canada shall be deemed to be severed, and shall form two separate provinces. The part which formerly constituted the province of Upper Canada shall constitute the province of Ontario; and the part which formerly constituted the province of Lower Canada shall constitute the province of Quebec.

Provinces
of Nova
Scotia and
New
Brun-
swick.
Decennial
census.

7. The provinces of Nova Scotia and New Brunswick shall have the same limits as at the passing of this act.

8. In the general census of the population of Canada which is hereby required to be taken in the year one thousand eight hundred and seventy-one, and in every tenth year thereafter, the respective populations of the four provinces shall be distinguished.

III.—EXECUTIVE POWER.

Declara-
tion of
executive
power in
the Queen.

9. The executive government and authority of and over Canada is hereby declared to continue and be vested in the Queen.

10. The provisions of this act referring to the governor-general extend and apply to the governor-general for the time being of Canada, or other the chief executive officer or administrator for the time being carrying on the government of Canada on behalf and in the name of the Queen, by whatever title he is designated.

Application of provisions referring to governor-general.

11. There shall be a council to aid and advise in the government of Canada, to be styled the Queen's privy council for Canada; and the persons who are to be members of that council shall be from time to time chosen and summoned by the governor-general and sworn in as privy councillors, and members thereof may be from time to time removed by the governor-general.

Constitution of privy council for Canada.

12. All powers, authorities, and functions which under any act of the parliament of Great Britain, or of the parliament of the United Kingdom of Great Britain and Ireland, or of the legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the union vested in or exerciseable by the respective governors or lieutenant-governors of those provinces, with the advice, or with the advice and consent, of the respective executive councils thereof, or in conjunction with those councils, or with any number of members thereof, or by those governors or lieutenant-governors individually, shall, as far as the same continue in existence and capable of being exercised after the union in relation to the government of Canada, be vested in and exerciseable by the governor-general, with the advice or with the advice and consent of or in conjunction with the Queen's privy council for Canada, or any members thereof, or by the governor-general individually, as the case requires, subject nevertheless (except with respect to such as exist under acts of the parliament of Great Britain or of the parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the parliament of Canada.

All powers under acts to be exercised by governor-general with advice of privy council or alone.

13. The provisions of this act referring to the governor-general in council shall be construed as referring to the governor-general acting by and with the advice of the Queen's privy council for Canada.

Application of provisions referring to governor-general in council.

14. It shall be lawful for the Queen, if her Majesty thinks fit, to authorise the governor-general from time to time to

Power to her Majesty to authorise governor-general to appoint deputies.

appoint any person or any persons jointly or severally to be his deputy or deputies within any part or parts of Canada, and in that capacity to exercise during the pleasure of the governor-general such of the powers, authorities, and functions of the governor-general as the governor-general deems it necessary or expedient to assign to him or them, subject to any limitations or directions expressed or given by the Queen; but the appointment of such a deputy or deputies shall not affect the exercise by the governor-general himself of any power, authority, or function.

Command of armed forces to continue to be vested in the Queen.
Seat of government of Canada.

15. The command-in-chief of the land and naval militia, and of all naval and military forces, of and in Canada, is hereby declared to continue and be vested in the Queen.

16. Until the Queen otherwise directs the seat of government of Canada shall be Ottawa.

IV.—LEGISLATIVE POWER.

Constitution of parliament of Canada.

17. There shall be one parliament for Canada, consisting of the Queen, an upper house styled the senate, and the house of commons.

Privileges &c. of houses.

18. The privileges, immunities, and powers to be held, enjoyed, and exercised by the senate and by the house of commons and by the members thereof respectively shall be such as are from time to time defined by act of the parliament of Canada, but so that the same shall never exceed those at the passing of this act held, enjoyed, and exercised by the commons house of parliament of the United Kingdom of Great Britain and Ireland and by the ministers thereof.

First session of the parliament of Canada.
Yearly session of the parliament of Canada.

19. The parliament of Canada shall be called together not later than six months after the union.

20. There shall be a session of the parliament of Canada once at least in every year, so that twelve months shall not intervene between the last sitting of the parliament in one session and its first sitting in the next session.

The Senate.

Number of senators.

21. The senate shall, subject to the provisions of this act, consist of seventy-two members, who shall be styled senators.

Representation of provinces in senate.

22. In relation to the constitution of the senate, Canada shall be deemed to consist of three divisions—

(1) Ontario ;
(2) Quebec ;
(3) The maritime provinces, Nova Scotia and New Brunswick ; which three divisions shall (subject to the provisions of this act) be equally represented in the senate as follows : Ontario by twenty-four senators ; Quebec by twenty-four senators ; and the maritime provinces by twenty-four senators, twelve thereof representing Nova Scotia, and twelve thereof representing New Brunswick.

In the case of Quebec each of the twenty-four senators representing that province shall be appointed for one of the twenty-four electoral divisions of Lower Canada specified in Schedule A. to Chapter One of the consolidated statutes of Canada.

23. The qualification of a senator shall be as follows :

Qualifica-
tions of
senator.

(1) He shall be of the full age of thirty years :

(2) He shall be either a natural-born subject of the Queen, or a subject of the Queen naturalised by an act of the parliament of Great Britain, or of the parliament of the United Kingdom of Great Britain and Ireland, or of the legislature of one of the provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the union, or of the parliament of Canada after the union :

(3) He shall be legally or equitably seised as of freehold for his own use and benefit of lands or tenements held in free and common socage, or seised or possessed for his own use and benefit of lands or tenements held in Franc-alieu or in roture, within the province for which he is appointed, of the value of four thousand dollars, over and above all rents, dues, debts, charges, mortgages, and incumbrances due or payable out of or charged on or affecting the same :

(4) His real and personal property shall be together worth four thousand dollars over and above his debts and liabilities :

(5) He shall be resident in the province for which he is appointed :

(6) In the case of Quebec he shall have his real property

qualification in the electoral division for which he is appointed, or shall be resident in that division.

Summons
of senator.

24. The governor-general shall from time to time, in the Queen's name, by instrument under the great seal of Canada, summon qualified persons to the senate; and, subject to the provisions of this act, every person so summoned shall become and be a member of the senate and a senator.

Summons
of first
body of
senators.

25. Such persons shall be first summoned to the senate as the Queen by warrant under her Majesty's royal sign manual thinks fit to approve, and their names shall be inserted in the Queen's proclamation of union.

Addition
of sena-
tors in
certain
cases.

26. If at any time on the recommendation of the governor-general the Queen thinks fit to direct that three or six members be added to the senate, the governor-general may by summons to three or six qualified persons (as the case may be), representing equally the three divisions of Canada, add to the senate accordingly.

Reduction
of senate
to normal
number.

27. In case of such addition being at any time made the governor-general shall not summon any person to the senate, except on a further like direction by the Queen on the like recommendation, until each of the three divisions of Canada is represented by twenty-four senators and no more.

Maximum
number of
senators.

28. The number of senators shall not at any time exceed seventy-eight.

Tenure of
place in
senate.

29. A senator shall, subject to the provisions of this act, hold his place in the senate for life.

Resigna-
tion of
place in
senate.

30. A senator may by writing under his hand addressed to the governor-general resign his place in the senate, and thereupon the same shall be vacant.

Disqualifi-
cation of
senators.

31. The place of a senator shall become vacant in any of the following cases:

- (1) If for two consecutive sessions of the parliament he fails to give his attendance in the senate:
- (2) If he takes an oath or makes a declaration or acknowledgment of allegiance, obedience, or adherence to a foreign power, or does an act whereby he becomes a subject or citizen, or entitled to the rights or privileges of a subject or citizen, of a foreign power:
- (3) If he is adjudged bankrupt or insolvent, or applies for

the benefit of any law relating to insolvent debtors, or becomes a public defaulter:

(4) If he is attainted of treason or convicted of felony or of any infamous crime:

(5) If he ceases to be qualified in respect of property or of residence; provided that a senator shall not be deemed to have ceased to be qualified in respect of residence by reason only of his residing at the seat of the government of Canada while holding an office under that government requiring his presence there.

32. When a vacancy happens in the senate by resignation, death, or otherwise, the governor-general shall by summons to a fit and qualified person fill the vacancy.

Summons on vacancy in senate.

33. If any question arises respecting the qualification of a senator or a vacancy in the senate the same shall be heard and determined by the senate.

Questions as to qualifications and vacancies in senate.

34. The governor-general may from time to time, by instrument under the great seal of Canada, appoint a senator to be speaker of the senate, and may remove him and appoint another in his stead.

Appointment of speaker of senate.

35. Until the parliament of Canada otherwise provides, the presence of at least fifteen senators, including the speaker, shall be necessary to constitute a meeting of the senate for the exercise of its powers.

Quorum of senate.

36. Questions arising in the senate shall be decided by a majority of voices, and the speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative.

Voting in senate.

The House of Commons.

37. The house of commons shall, subject to the provisions of this act, consist of one hundred and eighty-one members, of whom eighty-two shall be elected for Ontario, sixty-five for Quebec, nineteen for Nova Scotia, and fifteen for New Brunswick.

Constitution of house of commons in Canada.

38. The governor-general shall from time to time, in the Queen's name, by instrument under the great seal of Canada, summon and call together the house of commons.

Summoning of houses of commons.

39. A senator shall not be capable of being elected or of sitting or voting as a member of the house of commons.

Senators not to sit in house of commons.

Electoral
districts of
the four
provinces.

40. Until the parliament of Canada otherwise provides, Ontario, Quebec, Nova Scotia, and New Brunswick shall, for the purposes of the election of members to serve in the house of commons, be divided into electoral districts as follows :

1.—ONTARIO.

Ontario shall be divided into the counties, ridings of counties, cities, parts of cities, and towns enumerated in the first schedule to this act, each whereof shall be an electoral district, each such district as numbered in that schedule being entitled to return one member.

2.—QUEBEC.

Quebec shall be divided into sixty-five electoral districts, composed of the sixty-five electoral divisions into which Lower Canada is at the passing of this act divided under Chapter Two of the consolidated statutes of Canada, Chapter Seventy-five of the consolidated statutes for Lower Canada, and the act of the province of Canada of the twenty-third year of the Queen, Chapter One, or any other act amending the same in force at the union, so that each such electoral division shall be for the purposes of this act an electoral district entitled to return one member.

3.—NOVA SCOTIA.

Each of the eighteen counties of Nova Scotia shall be an electoral district. The county of Halifax shall be entitled to return two members, and each of the other counties one member.

4.—NEW BRUNSWICK.

Each of the fourteen counties into which New Brunswick is divided, including the city and county of St. John, shall be an electoral district. The city of St. John shall also be a separate electoral district. Each of those fifteen electoral districts shall be entitled to return one member.

Continu-
ance of
existing
election
laws until
parlia-
ment of

41. Until the parliament of Canada otherwise provides, all laws in force in the several provinces at the union relative to the following matters or any of them—namely, the qualifications and disqualifications of persons to be elected or to sit or vote as members of the house of assembly or legislative assembly in the

several provinces, the voters at elections of such members, the oaths to be taken by voters, the returning officers, their powers and duties, the proceedings at elections, the periods during which elections may be continued, the trial of controverted elections, and proceedings incident thereto, the vacating of seats of members, and the execution of new writs in case of seats vacated otherwise than by dissolution—shall respectively apply to elections of members to serve in the house of commons for the same several provinces.

Canada otherwise provides.

Provided that, until the parliament of Canada otherwise provides, at any election for a member of the house of commons for the district of Algoma, in addition to persons qualified by the law of the province of Canada to vote, every male British subject, aged twenty-one years or upwards, being a householder, shall have a vote.

42. For the first election of members to serve in the house of commons the governor-general shall cause writs to be issued by such person, in such form, and addressed to such returning officers as he thinks fit.

Writs for first election.

The person issuing writs under this section shall have the like powers as are possessed at the union by the officers charged with the issuing of writs for the election of members to serve in the respective house of assembly or legislative assembly of the province of Canada, Nova Scotia, or New Brunswick; and the returning officers to whom writs are directed under this section shall have the like powers as are possessed at the union by the officers charged with the returning of writs for the election of members to serve in the same respective house of assembly or legislative assembly.

43. In case a vacancy in the representation in the house of commons of any electoral district happens before the meeting of the parliament, or after the meeting of the parliament before provision is made by the parliament in this behalf, the provisions of the last foregoing section of this act shall extend and apply to the issuing and returning of a writ in respect of such vacant district.

As to casual vacancies.

44. The house of commons on its first assembling after a general election shall proceed with all practicable speed to elect one of its members to be speaker.

As to election of speaker of house of commons.

45. In case of a vacancy happening in the office of speaker

As to filling up vacancy in office of speaker.

Speaker to preside.

Provision in case of absence of speaker.

Quorum of house of commons.

Voting in house of commons.

Duration of house of commons.

Decennial readjustment of representation.

by death, resignation, or otherwise, the house of commons shall with all practicable speed proceed to elect another of its members to be speaker.

46. The speaker shall preside at all meetings of the house of commons.

47. Until the parliament of Canada otherwise provides, in case of the absence for any reason of the speaker from the chair of the house of commons for a period of forty-eight consecutive hours, the house may elect another of its members to act as speaker, and the member so elected shall during the continuance of such absence of the speaker have and execute all the powers, privileges, and duties of speaker.

48. The presence of at least twenty members of the house of commons shall be necessary to constitute a meeting of the house for the exercise of its powers; and for that purpose the speaker shall be reckoned as a member.

49. Questions arising in the house of commons shall be decided by a majority of voices other than that of the speaker, and when the voices are equal, but not otherwise, the speaker shall have a vote.

50. Every house of commons shall continue for five years from the day of the return of the writs for choosing the house (subject to be sooner dissolved by the governor-general), and no longer.

51. On the completion of the census in the year one thousand eight hundred and seventy-one, and of each subsequent decennial census, the representation of the four provinces shall be readjusted by such authority, in such manner, and from such time, as the parliament of Canada from time to time provide, subject and according to the following rules:

- (1) Quebec shall have the fixed number of sixty-five members:
- (2) There shall be assigned to each of the other provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained):
- (3) In the computation of the number of members for a province a fractional part not exceeding one-half of

the whole number requisite for entitling the province to a member shall be disregarded ; but a fractional part exceeding one-half of that number shall be equivalent to the whole number :

- (4) On any such readjustment the number of members for a province shall not be reduced unless the proportion which the number of the population of the province bore to the number of the aggregate population of Canada at the then last preceding readjustment of the number of members for the province is ascertained at the then latest census to be diminished by one twentieth part or upwards :

- (5) Such readjustment shall not take effect until the termination of the then existing parliament.

52. The number of members of the house of commons may be from time to time increased by the parliament of Canada, provided the proportionate representation of the provinces prescribed by this act is not thereby disturbed.

Increase of number of house of commons.

Money Votes ; Royal Assent.

53. Bills for appropriating any part of the public revenue, or for imposing any tax or impost, shall originate in the house of commons.

Appropriation and tax bills.

54. It shall not be lawful for the house of commons to adopt or pass any vote, resolution, address, or bill for the appropriation of any part of the public revenue, or of any tax or impost, to any purpose that has not been first recommended to that house by message of the governor-general in the session in which such vote, resolution, address, or bill is proposed.

Recommendation of money votes.

55. Where a bill passed by the houses of parliament is presented to the governor-general for the Queen's assent, he shall declare, according to his discretion, but subject to the provisions of this act and to her Majesty's instructions, either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the bill for the consideration of the Queen's pleasure.

Royal assent to bills, &c.

56. Where the governor-general assents to a bill in the Queen's name, he shall by the first convenient opportunity send an authentic copy of the act to one of her Majesty's principal

Disallowance by order in council of

act as-
sented to
by gover-
nor-
general.

secretaries of state, and if the Queen in council within two years after receipt thereof by the secretary of state thinks fit to disallow the act, such disallowance (with a certificate of the secretary of state of the day on which the act was received by him) being signified by the governor-general, by speech or message to each of the houses of the parliament, or by proclamation, shall annul the act from and after the day of such signification.

Significa-
tion of
Queen's
pleasure
on bill re-
served.

57. A bill reserved for the signification of the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the governor-general for the Queen's assent, the governor-general signifies, by speech or message to each of the houses of the parliament, or by proclamation, that it has received the assent of the Queen in council.

An entry of every such speech, message, or proclamation shall be made in the journal of each house, and a duplicate thereof duly attested shall be delivered to the proper officer to be kept among the records of Canada.

V.—PROVINCIAL CONSTITUTIONS.

Executive Power.

Appoint-
ment of
lieu-
tenant-
governors
of pro-
vinces.

Tenure of
office of
lieu-
tenant-
governor.

58. For each province there shall be an officer, styled the lieutenant-governor, appointed by the governor-general in council by instrument under the great seal of Canada.

59. A lieutenant-governor shall hold office during the pleasure of the governor-general; but any lieutenant-governor appointed after the commencement of the first session of the parliament of Canada shall not be removable within five years from his appointment, except for cause assigned, which shall be communicated to him in writing within one month after the order for his removal is made, and shall be communicated by message to the senate and to the house of commons within one week thereafter if the parliament is then sitting, and if not then within one week after the commencement of the next session of the parliament.

Salaries
of lieu-
tenant-
governors.

60. The salaries of the lieutenant-governors shall be fixed and provided by the parliament of Canada.

61. Every lieutenant-governor shall, before assuming the

duties of his office, make and subscribe before the governor-general, or some person authorised by him, oaths of allegiance and office similar to those taken by the governor-general.

Oaths, &c. of lieutenant-governor.

62. The provisions of this act referring to the lieutenant-governor extend and apply to the lieutenant-governor for the time being of each province, or other the chief executive officer or administrator for the time being carrying on the government of the province, by whatever title he is designated.

Application of provisions referring to lieutenant-governor.

63. The executive council of Ontario and of Quebec shall be composed of such persons as the lieutenant-governor from time to time thinks fit, and in the first instance of the following officers, namely, the attorney-general, the secretary and registrar of the province, the treasurer of the province, the commissioner of Crown lands, and the commissioner of agriculture and public works, with, in Quebec, the speaker of the legislative council and the solicitor-general.

Appointment of executive officers for Ontario and Quebec.

64. The constitution of the executive authority in each of the provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this act, continue as it exists at the union until altered under the authority of this act.

Executive government of Nova Scotia and New Brunswick.

65. All powers, authorities, and functions which under any act of the parliament of Great Britain, or of the parliament of the United Kingdom of Great Britain and Ireland, or of the legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the union vested in or exerciseable by the respective governors or lieutenant-governors of those provinces, with the advice, or with the advice and consent of the respective executive councils thereof, or in conjunction with those councils, or with any number of members thereof, or by those governors or lieutenant-governors individually, shall, as far as the same are capable of being exercised after the union in relation to the government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the lieutenant-governor of Ontario and Quebec respectively, with the advice or with the advice and consent of or in conjunction with the respective executive councils, or any members thereof, or by the lieutenant-governor individually, as the case requires, subject nevertheless (except with respect to such as exist under acts of the parliament of Great Britain, or of the parliament of the United Kingdom of Great Britain and Ireland) to be

Powers to be exercised by lieutenant-governor of Ontario or Quebec with advice or alone.

abolished or altered by the respective legislatures of Ontario and Quebec.

Applica-
tion of
provisions
referring
to lieu-
tenant-
governor
in council.

Adminis-
tration in
absence,
&c. of
lieu-
tenant-
governor.

Seats of
provincial
govern-
ments.

66. The provisions of this act referring to the lieutenant-governor in council shall be construed as referring to the lieutenant-governor of the province acting by and with the advice of the executive council thereof.

67. The governor-general in council may from time to time appoint an administrator to execute the office and functions of lieutenant-governor during his absence, illness, or other inability.

68. Unless and until the executive government of any province otherwise directs with respect to that province, the seats of government of the provinces shall be as follows, namely—of Ontario, the city of Toronto; of Quebec, the city of Quebec; of Nova Scotia, the city of Halifax; and of New Brunswick, the city of Fredericton.

Legislative Power.

1.—ONTARIO.

Legis-
lature for
Ontario.

69. There shall be a legislature for Ontario consisting of the lieutenant-governor and of one house, styled the legislative assembly of Ontario.

Electoral
districts.

70. The legislative assembly of Ontario shall be composed of eighty-two members, to be elected to represent the eighty-two electoral districts set forth in the first schedule to this act.

2.—QUEBEC.

Legis-
lature for
Quebec.

71. There shall be a legislature for Quebec consisting of the lieutenant-governor and of two houses, styled the legislative council of Quebec and the legislative assembly of Quebec.

Constitu-
tion of
legislative
council.

72. The legislative council of Quebec shall be composed of twenty-four members, to be appointed by the lieutenant-governor in the Queen's name, by instrument under the great seal of Quebec, one being appointed to represent each of the twenty-four electoral divisions of Lower Canada in this act referred to, and each holding office for the term of his life, unless the legislature of Quebec otherwise provides under the provisions of this act.

73. The qualifications of the legislative councillors of Quebec shall be the same as those of the senators for Quebec.

Qualifica-
tion of
legislative
council-
lors.

74. The place of a legislative councillor of Quebec shall become vacant in the cases, *mutatis mutandis*, in which the place of senator becomes vacant.

Resigna-
tion, dis-
qualifica-
tion, &c.

75. When a vacancy happens in the legislative council of Quebec by resignation, death, or otherwise, the lieutenant-governor, in the Queen's name, by instrument under the great seal of Quebec, shall appoint a fit and qualified person to fill the vacancy.

Vacan-
cies.

76. If any question arises respecting the qualification of a legislative councillor of Quebec, or a vacancy in the legislative council of Quebec, the same shall be heard and determined by the legislative council.

Questions
as to
vacancies,
&c.

77. The lieutenant-governor may from time to time, by instrument under the great seal of Quebec, appoint a member of the legislative council of Quebec to be speaker thereof, and may remove him and appoint another in his stead.

Speaker
of legis-
lative
council.

78. Until the legislature of Quebec otherwise provides, the presence of at least ten members of the legislative council, including the speaker, shall be necessary to constitute a meeting for the exercise of its powers.

Quorum
of legis-
lative
council.

79. Questions arising in the legislative council of Quebec shall be decided by a majority of voices, and the speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative.

Voting in
legislative
council.

80. The legislative assembly of Quebec shall be composed of sixty-five members, to be elected to represent the sixty-five electoral divisions or districts of Lower Canada in this act referred to, subject to alteration thereof by the legislature of Quebec: provided that it shall not be lawful to present to the lieutenant-governor of Quebec for assent any bill for altering the limits of any of the electoral divisions or districts mentioned in the second schedule to this act, unless the second and third readings of such bill have been passed in the legislative assembly with the concurrence of the majority of the members representing all those electoral divisions or districts, and the assent shall not be given to such bill unless an address has been presented by the legislative assembly to the lieutenant-governor stating that it has been so passed.

Constitu-
tion of
legislative
assembly
of Quebec.

3.—ONTARIO AND QUEBEC.

First ses-
sion of
legis-
latures.

81. The legislatures of Ontario and Quebec respectively shall be called together not later than six months after the union.

Summon-
ing of
legislative
assem-
blies.

82. The lieutenant-governor of Ontario and of Quebec shall from time to time, in the Queen's name, by instrument under the great seal of the province, summon and call together the legislative assembly of the province.

Restric-
tion on
election
of holders
of offices.

83. Until the legislature of Ontario or of Quebec otherwise provides, a person accepting or holding in Ontario or in Quebec any office, commission, or employment, permanent or temporary, at the nomination of the lieutenant-governor, to which an annual salary, or any fee, allowance, emolument, or profit of any kind or amount whatever from the province is attached, shall not be eligible as a member of the legislative assembly of the respective province, nor shall he sit or vote as such; but nothing in this section shall make ineligible any person being a member of the executive council of the respective province, or holding any of the following offices, that is to say—the offices of attorney-general, secretary and registrar of the province, treasurer of the province, commissioner of Crown lands, and commissioner of agriculture and public works, and in Quebec solicitor-general, or shall disqualify him to sit or vote in the house for which he is elected, provided he is elected while holding such office.

Continu-
ance of
existing
election
laws.

84. Until the legislatures of Ontario and Quebec respectively otherwise provide, all laws which at the union are in force in those provinces respectively, relative to the following matters, or any of them—namely, the qualifications and disqualifications of persons to be elected or to sit or vote as members of the assembly of Canada, the qualifications or disqualifications of voters, the oaths to be taken by voters, the returning officers, their powers and duties, the proceedings at elections, the periods during which such elections may be continued, and the trial of controverted elections and the proceedings incident thereto, the vacating of the seats of members and the issuing and execution of new writs in case of seats vacated otherwise than by dissolution—shall respectively apply to elections of

members to serve in the respective legislative assemblies of Ontario and Quebec.

Provided that until the legislature of Ontario otherwise provides, at any election for a member of the legislative assembly of Ontario for the district of Algoma, in addition to persons qualified by the law of the province of Canada to vote, every British subject aged twenty-one years or upwards, being a householder, shall have a vote.

85. Every legislative assembly of Ontario and every legislative assembly of Quebec shall continue for four years from the day of the return of the writs for choosing the same (subject, nevertheless, to either the legislative assembly of Ontario or the legislative assembly of Quebec being sooner dissolved by the lieutenant-governor of the province), and no longer.

Duration of legislative assemblies.

86. There shall be a session of the legislature of Ontario and of that of Quebec once at least in every year, so that twelve months shall not intervene between the last sitting of the legislature in each province in one session and its first sitting in the next session.

Yearly session of legislature.

87. The following provisions of this act respecting the house of commons of Canada shall extend and apply to the legislative assemblies of Ontario and Quebec—that is to say, the provisions relating to the election of a speaker originally and on vacancies, the duties of the speaker, the absence of the speaker, the quorum, and the mode of voting, as if those provisions were here re-enacted and made applicable in terms to each such legislative assembly.

Speaker, quorum, &c.

4.—NOVA SCOTIA AND NEW BRUNSWICK.

88. The constitution of the legislature of each of the provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this act, continue as it exists at the union until altered under the authority of this act; and the house of assembly of New Brunswick existing at the passing of this act shall, unless sooner dissolved, continue for the period for which it was elected.

Constitutions of legislatures of Nova Scotia and New Brunswick.

5.—ONTARIO, QUEBEC, AND NOVA SCOTIA.

89. Each of the lieutenant-governors of Ontario, Quebec, and Nova Scotia shall cause writs to be issued for the first

First elections.

election of members of the legislative assembly thereof in such form and by such person as he thinks fit, and at such time and addressed to such returning officer as the governor-general directs, and so that the first election of member of assembly for any electoral district or any subdivision thereof shall be held at the same time and at the same places as the election for a member to serve in the house of commons of Canada for that electoral district.

6.—THE FOUR PROVINCES.

Applica-
tion to
legis-
latures of
provisions
respecting
money
votes, &c.

90. The following provisions of this act respecting the parliament of Canada—namely, the provisions relating to appropriation and tax bills, the recommendation of money votes, the assent to bills, the disallowance of acts, and the significance of pleasure on bills reserved—shall extend and apply to the legislatures of the several provinces as if those provisions were here re-enacted and made applicable in terms to the respective provinces and the legislatures thereof, with the substitution of the lieutenant-governor of the province for the governor-general, of the governor-general for the Queen and for a secretary of state, of one year for two years, and of the province for Canada.

VI.—DISTRIBUTION OF LEGISLATIVE POWERS.

Powers of the Parliament.

Legisla-
tive autho-
rity of
parlia-
ment of
Canada.

91. It shall be lawful for the Queen, by and with the advice and consent of the senate and house of commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this act) the exclusive legislative authority of the parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:

- (1.) The public debt and property.
- (2.) The regulation of trade and commerce.
- (3.) The raising of money by any mode or system of taxation.

- (4.) The borrowing of money on the public credit.
- (5.) Postal service.
- (6.) The census and statistics.
- (7.) Militia, military and naval service, and defence.
- (8.) The fixing of and providing for the salaries and allowances of civil and other officers of the government of Canada.
- (9.) Beacons, buoys, lighthouses, and Sable Island.
- (10.) Navigation and shipping.
- (11.) Quarantine and the establishment and maintenance of marine hospitals.
- (12.) Sea coast and inland fisheries.
- (13.) Ferries between a province and any British or foreign country or between two provinces.
- (14.) Currency and coinage.
- (15.) Banking, incorporation of banks, and the issue of paper money.
- (16.) Savings banks.
- (17.) Weights and measures.
- (18.) Bills of exchange and promissory notes.
- (19.) Interest.
- (20.) Legal tender.
- (21.) Bankruptcy and insolvency.
- (22.) Patents of invention and discovery.
- (23.) Copyrights.
- (24.) Indians and lands reserved for the Indians.
- (25.) Naturalisation and aliens.
- (26.) Marriage and divorce.
- (27.) The criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters.
- (28.) The establishment, maintenance, and management of penitentiaries.
- (29.) Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this act assigned exclusively to the legislatures of the provinces.

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this act assigned exclusively to the legislatures of the provinces.

Exclusive Powers of Provincial Legislatures.

Subjects
of exclu-
sive pro-
vincial
legisla-
tion.

92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated—that is to say :

(1.) The amendment from time to time, notwithstanding anything in this act, of the constitution of the province, except as regards the office of lieutenant-governor.

(2.) Direct taxation within the province in order to the raising of a revenue for provincial purposes.

(3.) The borrowing of money on the sole credit of the province.

(4.) The establishment and tenure of provincial offices and the appointment and payment of provincial officers.

(5.) The management and sale of the public lands belonging to the province and of the timber and wood thereon.

(6.) The establishment, maintenance, and management of public and reformatory prisons in and for the province.

(7.) The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals.

(8.) Municipal institutions in the province.

(9.) Shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for provincial, local, or municipal purposes.

(10.) Local works and undertakings other than such as are of the following classes :

a. Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province.

b. Lines of steam ships between the province and any British or foreign country.

c. Such works as, although wholly situate within the province, are before or after their execution declared by the parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

(11.) The incorporation of companies with provincial objects.

(12.) The solemnisation of marriage in the province.

(13.) Property and civil rights in the province.

(14.) The administration of justice in the province, including the constitution, maintenance, and organisation of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.

(15.) The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province, made in relation to any matter coming within any of the classes of subjects enumerated in this section.

(16.) Generally all matters of a merely local or private nature in the province.

Education.

93. In and for each province the legislature may exclusively make laws in relation to education, subject and according to the following provisions :

Legisla-
tion re-
specting
education.

(1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union.

(2.) All the powers, privileges, and duties at the union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.

(3.) Where in any province a system of separate or dissentient schools exists by law at the union or is thereafter established by the legislature of the province, an appeal shall lie to the governor-general in council from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

(4.) In case any such provincial law as from time to time seems to the governor-general in council requisite for the due execution of the provisions of this section is not made, or in case any decision of the governor-general in council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the parliament of Canada may make remedial laws for the due execution of the

provisions of this section and of any decision of the governor-general in council under this section.

Uniformity of Laws in Ontario, Nova Scotia, and New Brunswick.

Legislation for uniformity of laws in three provinces.

94. Notwithstanding anything in this act, the parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick, and of the procedure of all or any of the courts in those three provinces, and from and after the passing of any act in that behalf the power of the parliament of Canada to make laws in relation to any matter comprised in any such act shall, notwithstanding anything in this act, be unrestricted; but any act of the parliament of Canada making provision for such uniformity shall not have effect in any province unless and until it is adopted and enacted as law by the legislature thereof.

Agriculture and Immigration.

Concurrent powers of legislation respecting agriculture, &c.

95. In each province the legislature may make laws in relation to agriculture in the province, and to immigration into the province; and it is hereby declared that the parliament of Canada may from time to time make laws in relation to agriculture in all or any of the provinces, and to immigration into all or any of the provinces; and any law of the legislature of a province relative to agriculture or to immigration shall have effect in and for the province as long and as far only as it is not repugnant to any act of the parliament of Canada.

VII.—JUDICATURE.

Appointment of judges.

96. The governor-general shall appoint the judges of the superior, district, and county courts in each province, except those of the courts of probate in Nova Scotia and New Brunswick.

Selection of judges in Ontario, &c.

97. Until the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick, and the procedure of the courts in those provinces, are made uniform, the judges of the courts of those provinces appointed by the governor-general shall be selected from the respective bars of those provinces.

Selection of judges in Quebec.

98. The judges of the courts of Quebec shall be selected from the bar of that province.

99. The judges of the superior courts shall hold office during good behaviour, but shall be removable by the governor-general on address of the senate and house of commons.

Tenure of office of judges of superior courts.

100. The salaries, allowances, and pensions of the judges of the superior, district, and county courts (except the courts of probate in Nova Scotia and New Brunswick), and of the admiralty courts in cases where the judges thereof are for the time being paid by salary, shall be fixed and provided by the parliament of Canada.

Salaries, &c. of judges.

101. The parliament of Canada may, notwithstanding anything in this act, from time to time provide for the constitution, maintenance, and organisation of a general court of appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada.

General court of appeal, &c.

VIII.—REVENUES, DEBTS, ASSETS, TAXATION.

102. All duties and revenues over which the respective legislatures of Canada, Nova Scotia, and New Brunswick before and at the union had and have power of appropriation, except such portions thereof as are by this act reserved to the respective legislatures of the provinces, or are raised by them in accordance with the special powers conferred on them by this act, shall form one consolidated revenue fund, to be appropriated for the public service of Canada in the manner and subject to the charges in this act provided.

Creation of consolidated revenue fund.

103. The consolidated revenue fund of Canada shall be permanently charged with the costs, charges, and expenses incident to the collection, management, and receipt thereof, and the same shall form the first charge thereon, subject to be reviewed and audited in such manner as shall be ordered by the governor-general in council until the parliament otherwise provides.

Expenses of collection, &c.

104. The annual interest of the public debts of the several provinces of Canada, Nova Scotia, and New Brunswick at the union shall form the second charge on the consolidated revenue fund of Canada.

Interest of provincial public debts.

105. Unless altered by the parliament of Canada, the salary of the governor-general shall be ten thousand pounds sterling money of the United Kingdom of Great Britain and Ireland,

Salary of governor-general.

payable out of the consolidated revenue fund of Canada, and the same shall form the third charge thereon.

Appropriation from time to time. 106. Subject to the several payments by this act charged on the consolidated revenue fund of Canada, the same shall be appropriated by the parliament of Canada for the public service.

Transfer of stocks, &c. 107. All stocks, cash, banker's balances, and securities for money belonging to each province at the time of the union, except as in this act mentioned, shall be the property of Canada, and shall be taken in reduction of the amount of the respective debts of the provinces of the union.

Transfer of property in schedule. 108. The public works and property of each province, enumerated in the third schedule to this act, shall be the property of Canada.

Property in lands, mines, &c. 109. All lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick at the union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.

Assets connected with provincial debts. 110. All assets connected with such portions of the public debt of each province as are assumed by that province shall belong to that province.

Canada to be liable to provincial debts. 111. Canada shall be liable for the debts and liabilities of each province existing at the union.

Debts of Ontario and Quebec. 112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the province of Canada exceeds at the union sixty-two million five hundred thousand dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Assets of Ontario and Quebec. 113. The assets enumerated in the fourth schedule to this act belonging at the union to the province of Canada shall be the property of Ontario and Quebec conjointly.

Debt of Nova Scotia. 114. Nova Scotia shall be liable to Canada for the amount (if any) by which its public debt exceeds at the union eight million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

115. New Brunswick shall be liable to Canada for the

amount (if any) by which its public debt exceeds at the union seven million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Debt of New Brunswick.

116. In case the public debts of Nova Scotia and New Brunswick do not at the union amount to eight million and seven million dollars respectively, they shall respectively receive by half-yearly payments in advance from the government of Canada interest at five per centum per annum on the difference between the actual amounts of their respective debts and such stipulated amounts.

Payment of interest to Nova Scotia and New Brunswick.

117. The several provinces shall retain all their respective public property not otherwise disposed of in this act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country.

Provincial public property.

118. The following sums shall be paid yearly by Canada to the several provinces for the support of their governments and legislatures :

Grants to provinces.

	Dollars
Ontario	Eighty thousand
Quebec	Seventy thousand
Nova Scotia	Sixty thousand
New Brunswick	Fifty thousand

Two hundred and sixty thousand

and an annual grant in aid of each province shall be made, equal to eighty cents per head of the population as ascertained by the census of one thousand eight hundred and sixty-one, and in the case of Nova Scotia and New Brunswick, by each subsequent decennial census until the population of each of those two provinces amounts to four hundred thousand souls, at which rate such grant shall thereafter remain. Such grants shall be in full settlement of all future demands on Canada, and shall be paid half-yearly in advance to each province; but the government of Canada shall deduct from such grants, as against any province, all sums chargeable as interest on the public debt of that province in excess of the several amounts stipulated in this act.

119. New Brunswick shall receive by half-yearly payments in advance from Canada for the period of ten years from the union an additional allowance of sixty-three thousand dollars

Further grant to New Brunswick.

per annum; but as long as the public debt of that province remains under seven million dollars, a deduction equal to the interest at five per centum per annum on such deficiency shall be made from that allowance of sixty-three thousand dollars.

Form of
payments.

120. All payments to be made under this act, or in discharge of liabilities created under any act of the provinces of Canada, Nova Scotia, and New Brunswick respectively, and assumed by Canada, shall, until the parliament of Canada otherwise directs, be made in such form and manner as may from time to time be ordered by the governor-general in council.

Canadian
manufac-
tures, &c.

121. All articles of the growth, produce, or manufacture of any one of the provinces shall, from and after the union, be admitted free into each of the other provinces.

Continu-
ance of
customs
and excise
laws.

122. The customs and excise laws of each province shall, subject to the provisions of this act, continue in force until altered by the parliament of Canada.

Exporta-
tion and
importa-
tion as
between
two pro-
vinces.

123. Where customs duties are, at the union, leviable on any goods, wares, or merchandises in any two provinces, those goods, wares, and merchandises may, from and after the union, be imported from one of those provinces into the other of them on proof of payment of the customs duty leviable thereon in the province of exportation, and on payment of such further amount (if any) of customs duty as is leviable thereon in the province of importation.

Lumber
dues in
New
Brunsw-
wick.

124. Nothing in this act shall affect the right of New Brunswick to levy the lumber dues provided in Chapter Fifteen of title three of the revised statutes of New Brunswick, or in any act amending that act before or after the union, and not increasing the amount of such dues; but the lumber of any of the provinces other than New Brunswick shall not be subject to such dues.

Exemp-
tion of
public
lands, &c.

125. No lands or property belonging to Canada or any province shall be liable to taxation.

Provincial
consoli-
dated
revenue
fund.

126. Such portions of the duties and revenues over which the respective legislatures of Canada, Nova Scotia, and New Brunswick had before the union power of appropriation as are by this act reserved to the respective governments or legislatures of the provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon

them by this act, shall in each province form one consolidated revenue fund to be appropriated for the public service of the province.

IX.—MISCELLANEOUS PROVISIONS.

General.

127. If any person being at the passing of this act a member of the legislative council of Canada, Nova Scotia, or New Brunswick, to whom a place in the senate is offered, does not within thirty days thereafter, by writing under his hand addressed to the governor-general of the province of Canada or to the lieutenant-governor of Nova Scotia or New Brunswick (as the case may be), accept the same, he shall be deemed to have declined the same; and any person who, being at the passing of this act a member of the legislative council of Nova Scotia or New Brunswick, accepts a place in the senate shall thereby vacate his seat in such legislative council.

As to legislative councilors of provinces becoming senators.

128. Every member of the senate or house of commons of Canada shall before taking his seat therein take and subscribe before the governor-general or some person authorised by him, and every member of a legislative council or legislative assembly of any province shall before taking his seat therein take and subscribe before the lieutenant-governor of the province or some person authorised by him, the oath of allegiance contained in the fifth schedule to this act; and every member of the senate of Canada and every member of the legislative council of Quebec shall also, before taking his seat therein, take and subscribe before the governor-general, or some person authorised by him, the declaration of qualification contained in the same schedule.

Oath of allegiance, &c.

129. Except as otherwise provided by this act, all laws in force in Canada, Nova Scotia, or New Brunswick, at the union, and all courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative and ministerial, existing therein at the union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under acts of the parliament of Great Britain or of the parliament of the United Kingdom of Great Britain and

Continuance of existing laws, courts, officers, &c.

Ireland) to be repealed, abolished, or altered by the parliament of Canada, or by the legislature of the respective province, according to the authority of the parliament or of that legislature under this act.

Transfer
of officers
to Canada.

130. Until the parliament of Canada otherwise provides, all officers of the several provinces having duties to discharge in relation to matters other than those coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces shall be officers of Canada, and shall continue to discharge the duties of their respective offices under the same liabilities, responsibilities, and penalties as if the union had not been made.

Appoint-
ment of
new
officers.

131. Until the parliament of Canada otherwise provides, the governor-general in council may from time to time appoint such officers as the governor-general in council deems necessary or proper for the effectual execution of this act.

Treaty ob-
ligations.

132. The parliament and government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British empire, towards foreign countries, arising under treaties between the empire and such foreign countries.

Use of
English
and
French
languages.

133. Either the English or the French language may be used by any person in the debates of the houses of the parliament of Canada and of the houses of the legislature of Quebec; and both those languages shall be used in the respective records and journals of those houses; and either of those languages may be used by any person or in any pleading or process in or issuing from any court of Canada established under this act, and in or from all or any of the courts of Quebec.

The acts of the parliament of Canada and of the legislature of Quebec shall be printed and published in both those languages.

Ontario and Quebec.

Appoint-
ment of
executive
officers for
Ontario
and
Quebec.

134. Until the legislature of Ontario or of Quebec otherwise provides, the lieutenant-governors of Ontario and Quebec may each appoint under the great seal of the province the following officers to hold office during pleasure—that is to say, the attorney-general, the secretary and registrar of the province, the treasurer of the province, the commissioner of Crown lands,

and the commissioner of agriculture and public works, and in the case of Quebec the solicitor-general; and may, by order of the lieutenant-governor in council, from time to time prescribe the duties of those officers and of the several departments over which they shall preside or to which they shall belong, and of the officers and clerks thereof; and may also appoint other and additional officers to hold office during pleasure, and may from time to time prescribe the duties of those officers, and of the several departments over which they shall preside or to which they shall belong, and of the officers and clerks thereof.

135. Until the legislature of Ontario or Quebec otherwise provides, all rights, powers, duties, functions, responsibilities, or authorities at the passing of this act vested in or imposed on the attorney-general, solicitor-general, secretary and registrar of the province of Canada, minister of finance, commissioner of Crown lands, commissioner of public works, and minister of agriculture and receiver-general, by any law, statute or ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this act, shall be vested in or imposed on any officer to be appointed by the lieutenant-governor for the discharge of the same or any of them; and the commissioner of agriculture and public works shall perform the duties and functions of the office of minister of agriculture at the passing of this act imposed by the law of the province of Canada, as well as those of the commissioner of public works.

Powers,
duties, &c.
of ex-
ecutive
officers.

136. Until altered by the lieutenant-governor in council, the great seals of Ontario and Quebec respectively shall be the same, or of the same design, as those used in the provinces of Upper Canada and Lower Canada respectively before their union as the province of Canada.

Great
seals.

137. The words 'and from thence to the end of the then next ensuing session of the legislature,' or words to the same effect, used in any temporary act of the province of Canada not expired before the union, shall be construed to extend and apply to the next session of the parliament of Canada, if the subject-matter of the act is within the powers of the same, as defined by this act, or to the next sessions of the legislatures of Ontario and Quebec respectively, if the subject-matter of the act is within the powers of the same as defined by this act.

Construc-
tion of
temporary
acts.

As to
errors in
names.

138. From and after the union the use of the words 'Upper Canada' instead of 'Ontario,' or 'Lower Canada' instead of 'Quebec,' in any deed, writ, process, pleading, document, matter, or thing, shall not invalidate the same.

As to issue
of procla-
mations
before
union, to
commence
after
union.

139. Any proclamation under the great seal of the province of Canada issued before the union to take effect at a time which is subsequent to the union, whether relating to that province, or to Upper Canada, or to Lower Canada, and the several matters and things therein proclaimed, shall be and continue of like force and effect as if the union had not been made.

As to issue
of procla-
mations
after
union.

140. Any proclamation which is authorised by any act of the legislature of the province of Canada to be issued under the great seal of the province of Canada, whether relating to that province, or to Upper Canada or to Lower Canada, and which is not issued before the union, may be issued by the lieutenant-governor of Ontario or of Quebec, as its subject matter requires, under the great seal thereof; and from and after the issue of such proclamation the same and the several matters and things therein proclaimed shall be and continue of the like force and effect in Ontario or Quebec as if the union had not been made.

Peniten-
tiary.

141. The penitentiary of the province of Canada shall, until the parliament of Canada otherwise provides, be and continue the penitentiary of Ontario and of Quebec.

Arbitra-
tion re-
specting
debts, &c.

142. The division and adjustment of the debts, credits, liabilities, properties, and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the government of Ontario, one by the government of Quebec, and one by the government of Canada; and the selection of the arbitrators shall not be made until the parliament of Canada and the legislatures of Ontario and Quebec have met; and the arbitrator chosen by the government of Canada shall not be a resident either in Ontario or in Quebec.

Division
of records.

143. The governor-general in council may from time to time order that such and so many of the records, books, and documents of the province of Canada as he thinks fit shall be appropriated and delivered either to Ontario or to Quebec, and the same shall thenceforth be the property of that province; and any copy thereof or extract therefrom, duly certified by the officer having charge of the original thereof, shall be admitted as evidence.

144. The lieutenant-governor of Quebec may from time to time, by proclamation under the great seal of the province, to take effect from a day to be appointed therein, constitute townships in those parts of the province of Quebec in which townships are not then already constituted, and fix the metes and bounds thereof.

Constitution of townships in Quebec.

X.—INTERCOLONIAL RAILWAY.

145. Inasmuch as the provinces of Canada, Nova Scotia, and New Brunswick have joined in a declaration that the construction of the Intercolonial railway is essential to the consolidation of the union of British North America, and to the assent thereto of Nova Scotia and New Brunswick, have consequently agreed that provision should be made for its immediate construction by the government of Canada: therefore, in order to give effect to that agreement, it shall be the duty of the government and parliament of Canada to provide for the commencement within six months after the union of a railway connecting the river St. Lawrence with the city of Halifax in Nova Scotia, and for the construction thereof without intermission, and the completion thereof with all practical speed.

Duty of government and parliament of Canada to make railway herein described.

XI.—ADMISSION OF OTHER COLONIES.

146. It shall be lawful for the Queen, by and with the advice of her Majesty's most honourable privy council, on addresses from the houses of the parliament of Canada, and from the houses of the respective legislatures of the colonies or provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those colonies or provinces, or any of them, into the union, and on address from the houses of the parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the union, on such terms and conditions in each case as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this act; and the provisions of any order in council in that behalf shall have effect as if they had been enacted by the parliament of the United Kingdom of Great Britain and Ireland.

Power to admit Newfoundland, &c. into the union.

147. In case of the admission of Newfoundland and Prince Edward Island, or either of them, each shall be entitled to a

As to representation of

New-
found-
land and
Prince
Edward
Island in
senate.

representation in the senate of Canada of four members, and (notwithstanding anything in this act) in case of the admission of Newfoundland the normal number of senators shall be seventy-six and their maximum number shall be eighty-two; but Prince Edward Island when admitted shall be deemed to be comprised in the third of the three divisions into which Canada is, in relation to the constitution of the senate, divided by this act, and accordingly, after the admission of Prince Edward Island, whether Newfoundland is admitted or not, the representation of Nova Scotia and New Brunswick in the senate shall, as vacancies occur, be reduced from twelve to ten members respectively, and the representation of each of those provinces shall not be increased at any time beyond ten, except under the provisions of this act for the appointment of three or six additional senators under the direction of the Queen.

SCHEDULES.

[*Note*.—The first and second schedules, defining the electoral districts of the provinces of Ontario and Quebec, are omitted, as they are subject to change, and have been altered, under section 51 of this act. For the last readjustment of representation, *vide* Statutes of Canada, 55 & 56 Vic. (1892), c. 11.—Ed.]

THE THIRD SCHEDULE.

Provincial Public Works and Property to be the Property of Canada.

1. Canals, with lands and water power connected therewith.
2. Public harbours.
3. Lighthouses and piers, and Sable Island.
4. Steamboats, dredges, and public vessels.
5. Rivers and lake improvements.
6. Railways and railway stocks, mortgages, and other debts due by railway companies.
7. Military roads.
8. Custom houses, post offices, and all other public buildings, except such as the government of Canada appropriate for the use of the provincial legislatures and governments.
9. Property transferred by the Imperial government, and known as ordnance property.

10. Armouries, drill-sheds, military clothing, and munitions of war, and lands set apart for general public purposes.

THE FOURTH SCHEDULE.

Assets to be the Property of Ontario and Quebec conjointly.

Upper Canada building fund.

Lunatic asylums.

Normal school.

Court houses

in

Aylmer, } Lower Canada.

Montreal,

Kamouraska, }

Law Society, Upper Canada.

Montreal Turnpike Trust.

University Permanent Fund.

Royal Institution.

Consolidated Municipal Loan Fund, Upper Canada.

Consolidated Municipal Loan Fund, Lower Canada.

Agricultural Society, Upper Canada.

Lower Canada Legislative Grant.

Quebec Fire Loan.

Tamiscouata Advance Account.

Quebec Turnpike Trust.

Education—East.

Building and Jury Fund, Lower Canada.

Municipalities Fund.

Lower Canada Superior Education Income Fund.

THE FIFTH SCHEDULE.

OATH OF ALLEGIANCE.

I, A. B., do swear that I will be faithful and bear true allegiance to her Majesty Queen Victoria.

Note.—The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time with proper terms of reference thereto.

DECLARATION OF QUALIFICATION.

I, *A. B.*, do declare and testify that I am by law duly qualified to be appointed a member of the senate of Canada [*or as the case may be*], and that I am legally or equitably seised as of freehold for my own use and benefit of lands or tenements held in free and common socage [*or seised or possessed for my own use and benefit of lands or tenements held in Franc-alieu or in rotture (as the case may be)*] in the province of Nova Scotia [*or as the case may be*] of the value of four thousand dollars over and above all rents, dues, debts, mortgages, charges, and incumbrances due or payable out of or charged on or affecting the same, and that I have not collusively or colourably obtained a title to or become possessed of the said lands and tenements or any part thereof for the purpose of enabling me to become a member of the senate of Canada [*or as the case may be*], and that my real and personal property are together worth four thousand dollars over and above my debts and liabilities.

BRITISH NORTH AMERICA ACT, 1871.

An Act respecting the Establishment of Provinces in the Dominion of Canada. 34 Vic. c. 28.

WHEREAS doubts have been entertained respecting the powers of the parliament of Canada to establish provinces in territories admitted, or which may hereafter be admitted, into the dominion of Canada, and to provide for the representation of such provinces in the said parliament, and it is expedient to remove such doubts, and to vest such powers in the said parliament.

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same as follows :

1. This act may be cited for all purposes as 'The British North America Act, 1871.'

2. The parliament of Canada may from time to time establish new provinces in any territories forming for the time being part of the dominion of Canada, but not included in any

Short
title.

Parlia-
ment of
Canada
may esta-
blish new

province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such province, and for the passing of laws for the peace, order, and good government of such province, and for its representation in the said parliament.

provinces and provide for the constitution, &c. thereof.

3. The parliament of Canada may from time to time, with the consent of the legislature of any province of the said dominion, increase, diminish, or otherwise alter the limits of such province, upon such terms and conditions as may be agreed to by the said legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any province affected thereby.

Alteration of limits of provinces.

4. The parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any province.

Parliament of Canada may legislate for any territory not included in a province.

5. The following acts passed by the said parliament of Canada, and intituled respectively—

‘An act for the temporary government of Rupert’s Land and the North-western Territory when united with Canada’; and

‘An act to amend and continue the act thirty-two and thirty-three Victoria, chapter three, and to establish and provide for the government of the province of Manitoba,’

Confirmation of acts of parliament of Canada. 32 & 33 Vic. c. 3. 33 Vic. c. 3.

shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen’s name, of the governor-general of the said dominion of Canada.

6. Except as provided by the third section of this act, it shall not be competent for the parliament of Canada to alter the provisions of the last-mentioned act of the said parliament in so far as it relates to the province of Manitoba, or of any other act hereafter establishing new provinces in the said dominion, subject always to the right of the legislature of the province of Manitoba to alter from time to time the provisions of any law respecting the qualification of electors and members of the legislative assembly, and to make laws respecting elections in the said province.

Limitation of powers of parliament of Canada to legislate for an established province.

PARLIAMENT OF CANADA ACT, 38 & 39 VIC.
C. 38, 1875.

An Act to remove certain doubts with respect to the powers of the Parliament of Canada under section 18 of the British North America Act, 1867.

30 & 31
Vic. c. 3.

WHEREAS by section eighteen of the British North America Act, 1867, it is provided as follows: 'The privileges, immunities, and powers to be held, enjoyed, and exercised by the senate and by the house of commons, and by the members thereof respectively, shall be such as are from time to time defined by act of the parliament of Canada, but so that the same shall never exceed those at the passing of this act held, enjoyed, and exercised by the commons house of parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.'

And whereas doubts have arisen with regard to the power of defining by an act of the parliament of Canada, in pursuance of the said section, the said privileges, powers, or immunities; and it is expedient to remove such doubts.

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Substitu-
tion of
new sec-
tion for
section 18
of 30 & 31
Vic. c. 3.

1. Section eighteen of the British North America Act, 1867, is hereby repealed, without prejudice to anything done under that section, and the following section shall be substituted for the section so repealed:

'The privileges, immunities, and powers to be held, enjoyed, and exercised by the senate and by the house of commons, and by the members thereof respectively, shall be such as are from time to time defined by act of the parliament of Canada, but so that any act of the parliament of Canada defining such privileges, immunities and powers shall not confer any privileges, immunities or powers exceeding those at the passing of such act held, enjoyed, and exercised by the commons house of parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.'

Confirma-
tion of act
of parlia-

2. The act of the parliament of Canada passed in the thirty-first year of the reign of her present Majesty, chapter twenty-four,

intituled 'An Act to provide for oaths to witnesses being administered in certain cases for the purposes of either house of parliament,' shall be deemed to be valid, and to have been valid as from the date at which the royal assent was given thereto by the governor-general of the dominion of Canada.

ment of
Canada.
31 & 32
Vic. c. 24.

3. This act may be cited as the Parliament of Canada Act, 1875.

Short
title.

BRITISH NORTH AMERICA ACT, 49 & 50 VIC.
C. 35, 1886.

(ACT RELATING TO THE B.N.A. ACT, 1867.)

An Act respecting the representation in the Parliament of Canada of territories which for the time being form part of the Dominion of Canada, but are not included in any province.

WHEREAS it is expedient to empower the parliament of Canada to provide for the representation in the senate and house of commons of Canada, or either of them, of any territory which for the time being forms part of the dominion of Canada, but is not included in any province :

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows :

1. The parliament of Canada may from time to time make provision for the representation in the senate and house of commons of Canada, or in either of them, of any territories which for the time being form part of the dominion of Canada, but are not included in any province thereof.

Provision
by parlia-
ment of
Canada
for repre-
sentation
of terri-
tories.

2. Any act passed by the parliament of Canada before the passing of this act for the purpose mentioned in this act shall, if not disallowed by the Queen, be, and shall be deemed to have been, valid and effectual from the date at which it received the assent, in her Majesty's name, of the governor-general of Canada.

Effect of
acts of
parlia-
ment of
Canada.

It is hereby declared that any act passed by the parliament of Canada, whether before or after the passing of this act, for the purpose mentioned in this act or in the British North

34 & 35
Vic. c. 28.
30 & 31
Vic. c. 3.

America Act, 1871, has effect, notwithstanding anything in the British North America Act, 1867, and the number of senators or the number of members of the house of commons specified in the last-mentioned act is increased by the number of senators or of members, as the case may be, provided by any such act of the parliament of Canada for the representation of any provinces or territories of Canada.

Short
title and
construc-
tion.

30 & 31
Vic. c. 3.
34 & 35
Vic. c. 28.

3. This act may be cited as the British North America Act, 1886.

This act and the British North America Act, 1867, and the British North America Act, 1871, shall be construed together, and may be cited together as the British North America Acts, 1867 to 1886.

SUCCESSIVE SECRETARIES OF STATE FOR THE COLONIES

From 1854 to December 1893.

From	To	
	1854	Right Hon. Sir George Grey, Bart.
	1855	Right Hon. Sidney Herbert.
	1855	Right Hon. Lord John Russell.
	1855	Right Hon. Sir William Molesworth, Bart.
1855-1857		Right Hon. Henry Labouchere,
	1858	Right Hon. Lord Stanley.
	1858	Right Hon. Sir Edward Bulwer Lytton
1859-1863		Right Hon. Duke of Newcastle, K.G.
1864-1865		Right Hon. Edward Cardwell.
	1866	Right Hon. Earl of Carnarvon.
1867-1868		Right Hon. Duke of Buckingham and Chandos.
1868-1869		Right Hon. Earl Granville, K.G.
1870-1873		Right Hon. Earl of Kimberley, K.G.
1874-1877		Right Hon. Earl of Carnarvon.
1878-1879		Right Hon. Sir Michael Hicks-Beach, Bart.
1880-1881		Right Hon. Earl of Kimberley, K.G.
1882-1885		Right Hon. Earl of Derby, K.G.
1885-1886		Right Hon. Colonel F. A. Stanley (now Earl of Derby).
	1886	Right Hon. Earl Granville, K.G.
	1886	Right Hon. Edward Stanhope.
1887-1892		Right Hon. Lord Knutsford.
1892		Right Hon. Marquis of Ripon.

SUCCESSIVE GOVERNORS, MINISTRIES, ETC. OF CANADA.

DOMINION OF CANADA.

Governors-General from Confederation to December 1893.

From	To	
1867-1868		Right Hon. Charles Stanley Viscount Monck, P.C., G.C.M.G.
1869-1872		Right Hon. Sir John Young, P.C., G.C.B., G.C.M.G. (created Baron Lisgar in October 1870).
1872-1878		Right Hon. Sir Frederick Temple Hamilton Temple Blackwood, Earl of Dufferin, K.P., K.C.B. (now Marquis of Dufferin and Ava).
1878-1883		Right Hon. Sir John Douglas Sutherland Campbell, Marquess of Lorne, P.C., K.T., G.C.M.G.
1883-1888		Most Hon. Henry Charles Keith Petty-Fitzmaurice, Marquess of Lansdowne, G.C.M.G.
1888-1893		Right Hon. Frederick Arthur Stanley, Baron Stanley of Preston, P.C., G.C.B. (succeeded to the title of Earl of Derby in May 1893).
1893		Right Hon. Sir John Campbell Hamilton Gordon, Earl of Aberdeen.

Ministries to December 1893.

From	To	Ministry
1867-1873		Macdonald.
1873-1878		Mackenzie.
1878-1891		Macdonald
1891-1892		Abbott
1892		Thompson

{ These three administrations are the same.
 Change of Premier caused, in the first
 instance, by the death of the Right
 Hon. Sir John A. Macdonald on
 6 June, 1891.

Successive High Commissioners in London.

Sir Alexander T. Galt, G.C.M.G.
 Sir Charles Tupper, Bart., G.C.M.G., C.B.

SUCCESSIVE LIEUT.-GOVERNORS OF THE PROVINCES OF CANADA.

*Lieut.-Governors of the Provincial Governments of Canada since
Confederation to December, 1893.^a*

ONTARIO.

From	To
1867-1868	Major-General Henry William Stisted.
1868-1873	Hon. William Pearce Howland.
1873-1875	Hon. John Willoughby Crawford.
1875-1880	Hon. Donald Alexander Macdonald.
1880-1887	Hon. John Beverley Robinson.
1887-1892	Sir Alexander Campbell, K.C.M.G.
1892	Hon. George Airey Kirkpatrick.

QUEBEC.

1867-1873	Sir Narcisse Fortunat Belleau, K.C.M.G.
1873-1876	Hon. René Edouard Caron.
1876-1879	Hon. Luc Letellier de St. Just.
1879-1884	Hon. Theodore Robitaille.
1884-1887	Hon. Louis François Rodrigue Masson.
1887-1892	Hon. Auguste Réal Angers.
1892	Hon. Joseph Adolphe Chapleau.

NOVA SCOTIA.

1867	Sir William Fenwick Williams, K.C.B.
1867-1873	Major-General Charles Hastings Doyle, K.C.M.G.
1873	Hon. Joseph Howe.
1873-1883	Hon. Adams George Archibald.
1883-1888	Hon. Matthew Henry Richey.
1888-1890	Hon. Archibald Woodbury McLelan.
1890	Hon. Malachy Bowes Daly.

NEW BRUNSWICK.

1867	Major-General Charles Hastings Doyle, K.C.M.G.
1867-1868	Colonel Francis Pym Harding, C.B.
1868-1873	Hon. Lemuel Allan Wilmot.
1873-1878	Hon. Sir Samuel Leonard Tilley, K.C.M.G., C.B.
1878-1880	Hon. Edward Barron Chandler.
1880-1885	Hon. Robert Duncan Wilmot.
1885-1893	Hon. Sir Samuel Leonard Tilley, K.C.M.G., C.B.
1893	Hon. John Boyd.
1893	Hon. John James Fraser.

^a McCord's Handbook of Canadian Dates, pp. 22, &c.

PRINCE EDWARD ISLAND.

From	To	
1873-1874		Hon. William Cleaver Francis Robinson.
1874-1879		Sir Robert Hodgson.
1879-1884		Hon. Thomas Heath Haviland.
1884-1889		Hon. Andrew Archibald Macdonald.
1889		Hon. Jedediah Slason Carvell.

MANITOBA.

1870-1872	Hon. Adams George Archibald.
1872-1877	Hon. Alexander Morris.
1877-1882	Hon. Joseph Edouard Cauchon.
1882-1888	Hon. James Cox Aikins.
1888-1893 ^b	Hon. John Christian Schultz.

BRITISH COLUMBIA.

1871-1876	Hon. Joseph William Trutch, C.M.G.
1876-1881	Hon. Albert Norton Richards.
1881-1887	Hon. Clement Francis Cornwall.
1887-1892	Hon. Hugh Nelson.
1892	Hon. Edgar Dewdney.

NORTH-WEST TERRITORIES.

1876-1881	Hon. David Laird.
1881-1888	Hon. Edgar Dewdney.
1888-1893	Hon. Joseph Royal.
1893	Hon. Charles Herbert Mackintosh.

*SUCCESSIVE GOVERNORS, MINISTRIES, &c.,
OF AUSTRALASIA.^c*

NEW SOUTH WALES.

Governors since establishment of Responsible Government.

From	To	
1855-1861		Sir William Thomas Denison, K.C.B.
1861-1867		Right Hon. Sir John Young, Bart., P.C., K.C.B., G.C.M.G.

^b Term of office expired in June, 1893, but holds office till successor is appointed.

^c For this return the Editor is indebted to The Year Book of Australia, an invaluable book of reference, replete with information of every description pertaining to Australia.

From	To	
1868-1872	Right Hon. Somerset Richard, Earl of Belmore, P.C.	
1872-1879	Sir Hercules George Robert Robinson, Knt., G.C.M.G.	
1879-1885	Right Hon. Augustus William Frederick Spencer, Lord Loftus, P.C., G.C.B.	
1885-1890	Right Hon. Charles Robert, Lord Carrington, P.C., G.C.M.G.	
1891-1893	Victor Albert George Child Villiers, Earl of Jersey, P.C., G.C.M.G.	
1893	Right Hon. Sir Robert W. Duff, K.C.M.G.	

Ministries.

From	To	Ministries	From	To	Ministries
	1856	Donaldson.	1875-1877	Robertson.	
	1856	Cowper.	1877	Parkes.	
1856-1857	Parker.		1877	Robertson.	
1857-1859	Cowper.		1877-1878	Farnell.	
1859-1860	Foster.		1878-1883	Parkes.	
1860-1863	Robertson-Cowper.		1883-1885	Stuart.	
1863-1865	Martin.		1885	Dibbs.	
1865-1866	Cowper.		1885-1886	Robertson.	
1866-1868	Martin.		1886-1887	Jennings.	
1868-1870	Robertson.		1887-1889	Parkes.	
1870	Cowper.		1889	Dibbs.	
1870-1872	Martin.		1889-1891	Parkes.	
1872-1875	Parkes.		1891	Dibbs.	

Successive Agents-General in London.

Edward Hamilton, Esq.	Sir Alexander Stuart, K.C.M.G.
William Colburn Mayne, Esq.	Sir Daniel Cooper, Bart., G.C.M.G.
Sir Charles Cowper, K.C.M.G.	Sir Saul Samuel, K.C.M.G., C.B.
William Forster, Esq.	

VICTORIA.

Governors since establishment of Responsible Government.

From	To	
1854-1855	Sir Charles Hotham, K.C.B.	
1856-1863	Sir Henry Barkly, K.C.B.	
1863-1866	Sir Charles Henry Darling, K.C.B.	
1866-1873	Right Hon. John Henry Thomas Manners-Sutton, K.C.B.	
1873-1879	Sir George Ferguson Bowen, G.C.M.G.	
1879-1884	Right Hon. George Augustus Constantine Phipps, Marquis of Normanby, P.C., G.C.M.G.	

900 PARLIAMENTARY GOVERNMENT IN THE COLONIES.

From	To	
1884-1889		Sir Henry Brougham Loch, G.C.M.G., K.C.B.
1889		Right Hon. John Adrian Louis Hope, Earl of Hopetoun.

Ministries.

From	To	Ministries	From	To	Ministries
1855-1857		Haines.	1872-1874		Francis.
	1857	O'Shanassy.	1874-1875		Kerferd.
1857-1858		Haines.		1875	Berry.
1858-1859		O'Shanassy.	1875-1877		McCulloch.
1859-1860		Nicholson.	1877-1880		Berry.
1860-1861		Heales.		1880	Service.
1861-1863		O'Shanassy.	1880-1881		Berry.
1863-1868		McCulloch.	1881-1883		O'Loughlen.
	1868	Sladen.	1883-1886		Service.
1868-1869		McCulloch.	1886-1890		Gillies.
1869-1870		Macpherson.	1890-1892		Munro.
1870-1871		McCulloch.	1892-1893		Shiels.
1871-1872		Duffy.	1893		Patterson.

Successive Agents-General in London.

Sir G. Verdon, K.C.M.G.	Lieut.-Gen. Sir Andrew Clarke,
Hon. H. C. E. Childers.	G.C.M.G.
Sir James McCulloch, K.C.M.G.	Sir G. Berry, K.C.M.G.
Sir A. Michie, K.C.M.G.	Lieut.-Gen. Sir Andrew Clarke,
Hon. H. C. E. Childers.	G.C.M.G.
Colonel Pasley.	Hon. James Munro.
R. Murray Smith, Esq.	Lieut.-Gen. Sir Andrew Clarke,
	G.C.M.G.

SOUTH AUSTRALIA.

Governors since establishment of Responsible Government.

From	To	
1855-1862		Sir Richard Graves Macdonnell, Knt., C.B.
1862-1868		Sir Dominick Daly, Knt.
1869-1873		Right Hon. Sir James Fergusson, Bart.
1873-1877		Sir Anthony Musgrave, K.C.M.G.
1877-1883		Lieut.-General Sir William Francis Drummond Jervois, C.B., G.C.M.G., R.E.
1883-1889		Sir William Cleaver Francis Robinson, K.C.M.G.
1889		Right Hon. Algernon Hawkins Thomond, Earl of Kintore, G.C.M.G.

Ministries.

From	To	Ministries	From	To	Ministries
1856-1857		Finniss.	1870-1871		Hart.
	1857	Baker.	1871-1872		Blyth.
	1857	Torrens.	1872-1873		Ayers.
1857-1860		Hanson.	1873-1875		Blyth.
1860-1861		Reynolds.	1875-1876		Boucaut.
1861-1863		Waterhouse.	1876-1877		Colton.
	1863	Dutton.	1877-1878		Boucaut.
1863-1864		Ayers.	1878-1881		Morgan.
1864-1865		Blyth.	1881-1884		Bray.
	1865	Dutton.	1884-1885		Colton.
	1865	Ayers.	1885-1887		Downer.
1865-1866		Hart.	1887-1889		Playford.
1866-1867		Boucaut.	1889-1890		Cockburn.
1867-1868		Ayers.	1890-1892		Playford.
	1868	Hart.		1892	Holder.
	1868	Ayers.	1892-1893		Downer.
1868-1870		Strangeways.	1893		Kingston.

Successive Agents-General in London.

Gregory Seale Walters, Esq.	Sir Arthur Blyth, K.C.M.G., C.B.
Francis Stacker Dutton, Esq., C.M.G.	Samuel Deering, Esq. (acting).
Samuel Deering, Esq. (acting).	Sir John Cox Bray, K.C.M.G.

QUEENSLAND.

Governors since establishment of Responsible Government.

From	To	
1859-1868		Sir George Ferguson Bowen, K.C.M.G.
1868-1871		Colonel Samuel Wensley Blackall.
1871-1874		The Most Hon. George Augustus Constantine, Marquis of Normanby, P.C.
1875-1877		Sir William Wellington Cairns, C.M.G.
1877-1883		Sir Arthur Edward Kennedy, G.C.M.G., C.B.
1883-1888		Sir Anthony Musgrave, G.C.M.G.
1889		General Sir Henry Wylie Norman, G.C.B., G.C.M.G., C.I.E.

Ministries.

From	To	Ministries	From	To	Ministries
1859	1866	Herbert.	1877	1879	Douglas.
	1866	Macalister.	1879	1882	McIlwraith.
1866	1867	Herbert-Macalister.	1883	1888	Griffith.
1867	1868	Mackenzie.		1888	McIlwraith.
1868	1869	Lilley.	1888	1890	Morehead.
1870	1874	Palmer.	1890	1893	Griffith.
1874	1876	Macalister.		1893	McIlwraith.
1876	1877	Thorn.	1893		Nelson.

Successive Agents-General in London.

Henry Jordan, Esq.	Sir James F. Garrick, K.C.M.G.,
John Douglas, Esq.	Q.C.
Arch. Archer, Esq.	Thomas Archer, Esq., C.M.G.
Richard Daintree, Esq.	Sir James F. Garrick, K.C.M.G.,
Arthur McAlister, Esq.	Q.C.
Thomas Archer, Esq., C.M.G.	

NEW ZEALAND.

Governors since establishment of Responsible Government.

From	To	
1855	1861	Colonel Sir Thomas Gore Browne, K.C.M.G., C.B.
1861	1868	Sir George Grey, K.C.B.
1868	1873	Sir George Ferguson Bowen, G.C.M.G.
	1873	Right Hon. Sir James Fergusson, Bart., K.C.M.G.
1874	1879	The Marquis of Normanby, G.C.M.G.
	1879	Sir Hercules George Robert Robinson, G.C.M.G.
1880	1883	Sir Arthur Hamilton Gordon, G.C.M.G.
1883	1889	Lieut.-General Sir William Francis Drummond Jervois, G.C.M.G., C.B.
1889	1892	The Earl of Onslow, G.C.M.G.
1892		The Earl of Glasgow, G.C.M.G.

Ministries.

From	To	Ministries	From	To	Ministries
	1856	Bell-Sewell.	1875-1876		Pollen.
	1856	Fox.		1876	Vogel.
1856-1861		Stafford.	1876-1877		Atkinson.
1861-1862		Fox.	1877-1879		Grey.
1862-1863		Domett.	1879-1882		Hall.
1863-1864		Whitaker.	1882-1883		Whitaker.
1864-1865		Weld.	1883-1884		Atkinson.
1865-1869		Stafford.		1884	Stout-Vogel.
1869-1872		Fox.		1884	Atkinson.
	1872	Stafford	1884-1887		Stout-Vogel.
1872-1873		Waterhouse.	1887-1891		Atkinson.
	1873	Fox.	1891-1893		Ballance.
1873-1875		Vogel.	1893		Seddon.

Successive Agents-General in London.

Dr. J. E. Featherston.	Sir Francis Dillon Bell, K.C.M.G.
Sir Wm. Tyrone Power, K.C.B.	C.B.
Sir Julius Vogel, K.C.M.G.	Walter Kennaway, Esq., C.M.G.
	Westby Brook Perceval, Esq.

TASMANIA.

Governors since establishment of Responsible Government.

From	To	
1855-1861		Sir Henry Edward Fox Young, Knt., C.B.
1861-1868		Colonel Thomas Gore Browne, C.B.
1869-1874		Charles Du Cane, Esq.
1875-1880		Frederick Aloysius Weld, Esq., C.M.G.
1880-1881		Sir John Henry Lefroy, K.C.M.G., C.B., Admini- strator.
1881-1886		Major Sir George Cumine Strahan, R.A., K.C.M.G.
1887-1893		Sir Robert George Crookshank Hamilton, K.C.B.
1893		Viscount Gormanston, K.C.M.G.

Ministries.

From	To	Ministries	From	To	Ministries
1856	1857	Champ.	1872	1873	Innes.
	1857	Gregson.	1873	1876	Kennerley.
	1857	Weston.	1876	1877	Reibey.
1857	1860	Smith.	1877	1878	Fysh.
1860	1861	Weston.	1878	1879	Crowther.
1861	1863	Chapman.	1879	1884	Giblin.
1863	1866	Whyte.	1884	1887	Douglas-Agnew.
1866	1869	Dry.	1887	1892	Fysh.
1869	1872	Wilson.			Dobson.

Successive Agents-General in London.

Hon. Adye Douglas.	Hon. Sir Edward Nicholas
Sir Arthur Blyth (Acting).	Coventry Braddon, K.C.M.G.
Sir James A. Youl, K.C.M.G.	Sir Robert G. W. Herbert,
(Acting).	G.C.B.

WESTERN AUSTRALIA.

Governors since establishment of Responsible Government.

From	To
1890	Sir William Cleaver Francis Robinson, G.C.M.G.

Ministries.

1890	Forrest Ministry.
------	-------------------

Agent-General in London.

Sir Malcolm Fraser, K.C.M.G.

*SUCCESSIVE GOVERNORS, MINISTRIES, ETC., OF
CAPE OF GOOD HOPE.*

Governors since establishment of Responsible Government.

From	To
1872	1877
1877	1880
1881	

Sir Henry Barkly, G.C.M.G., K.C.B.
Sir H. Bartle E. Frere, G.C.B., G.C.S.I.
Sir Hercules George Robert Robinson, G.C.M.G.

From	To	
	1882	Lieut.-General Hon. Sir Leicester Smyth, K.C.M.G., C.B., Administrator.
1883-1886		Right Hon. Sir H. G. R. Robinson, G.C.M.G.
	1886	Lieut.-General Sir H. D'O. Torrens, K.C.B., Admini- strator.
1887-1889		Right Hon. Sir H. G. R. Robinson, G.C.M.G.
	1889	Lieut.-General H. A. Smyth, C.M.G., Administrator.
	1889	Sir Henry Brougham Loch, G.C.M.G., G.C.B.

Ministries.

From	To	Ministries	From	To	Ministries
1872-1878		Molteno.	1886-1890		Sprigg.
1878-1881		Sprigg.	1890-1893		Rhodes.
1881-1884		Scanlen.	1893		Rhodes (second).
1884-1886		Upington.			

Agent-General in London.

Sir Charles Mills, K.C.M.G., C.B.

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